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The Potential Impact of *ProMedica:* Health Care and Beyond

On April 22, 2014, the United States Court of Appeals for the Sixth Circuit handed the Federal Trade Commission (FTC or Commission) another significant victory in a hospital merger,[1] ruling that the FTC's decision and order requiring that ProMedica divest St. Luke's, another Lucas County, Ohio-based hospital, was comprehensive, carefully reasoned and supported by substantial evidence.[2] This important victory for the FTC in the health care industry underscores the fact that merging parties in all industries will face vigorous enforcement under Section 7, especially when market shares are high, documents are problematic and significant pro-competitive efficiencies are not cited by the parties. The decision, along with several other notable recent FTC successes in enforcement actions, can be expected to further embolden an already aggressive antitrust enforcer.

The Sixth Circuit's Decision

In particular, the FTC (and U.S. Department of Justice (DOJ)) certainly will take note of the fact that the Sixth Circuit relied heavily on the FTC's and DOJ's 2010 Horizontal Merger Guidelines (Merger Guidelines) as if they were law, rather than merely guidelines intended to convey the approach the agencies may take in evaluating the competitive consequences of a merger.[3] In so doing, the court relied heavily on *U.S. v. H & R Block, Inc.* — a 2011 Washington, D.C. district court decision that also seemed to adopt fully the Merger Guidelines.[4] In addition, as is the trend in recent merger enforcement cases, the parties' documents factored heavily into the court's analysis.[5] For example, in rejecting ProMedica's "weakened competitor" argument, the court cited St. Luke's CEO's statement that St. Luke's could "run in the black if activity stays high."[6]

The parties argued extensively over the proper definition of the relevant product market,[7] providing the FTC its first opportunity since *F.T.C. v. Tenet Health Care Corp.*[8] to test its theory of hospital product markets at the circuit court level, let alone have a circuit court adopt its theory in its entirety. Specifically, the Sixth Circuit agreed with the FTC's proposed product market definition, finding two separate product markets for purposes of analyzing the merger's competitive effects: (i) primary services (but excluding inpatient obstetrical (OB) services) and secondary services;[9] and (ii) OB services. With respect to

1 *See, e.g.*, *F.T.C. v. Phoebe Putney Health System Inc.*, 133 S. Ct. 1003 (2013), *F.T.C. v. St. Luke's Health Sys., Ltd.*, 1:12-CV-00560-BLW, 2014 WL 272339 (D. Idaho Jan. 24, 2014).

2 *ProMedica Health Sys., Inc. v. F.T.C.*, 12-3583, 2014 WL 1584835 (6th Cir. Apr. 22, 2014). The Sixth Circuit heard the case on appeal from an administrative decision affirmed by the Commission.

3 Indeed, the Merger Guidelines themselves state that they are just that — guidelines, which "may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context." Merger Guidelines § 1.

4 833 F. Supp. 2d 36 (D.D.C. 2011).

5 *See, e.g.*, *U.S. v. Bazaarvoice, Inc.*, 13-CV-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

6 *ProMedica Health Sys., Inc.* at 18.

7 *Id*. at 7 – 12. The parties agreed that the relevant geographic market was Lucas County, Ohio.

8 186 F.3d 1045 (8th Cir. 1999).

9 Primary services include basic care, such as hernia surgeries and radiology services. *ProMedica Health Sys., Inc.* at 2 – 3. Secondary services, such as hip replacements and bariatric surgery, require more specialization. *Id*. at 3. Tertiary services, such as brain surgery and treatment for severe burns, require even more specialization. *Id*. Quaternary services, such as major organ transplants, require the highest level of specialization. *Id*.

the first market, the court agreed with the FTC's "clustering" theory,[10] reasoning that: (i) the respective market shares for each of Lucas County's four hospital systems are similar across the range of primary and secondary services; and (ii) barriers to entry are similar across primary and secondary services.[11] The Sixth Circuit also agreed with the FTC's argument that OB services should be treated differently for purposes of analyzing the merger's competitive effects, reasoning that: (i) premerger, ProMedica's market share for OB services was 71.2 percent, more than 50 percent greater than its market share for primary and secondary services (46.8 percent), and would be driven up to 80.5 percent post-merger; and (ii) premerger, there were only three hospital systems providing OB services in Lucas County (as opposed to four hospital systems providing primary and secondary services), which would be reduced to two hospitals post-merger.[12]

While the court stated that the Merger Guidelines are "useful but not binding," it nonetheless relied extensively on them throughout much of its analysis. For example, the court placed great importance on the Herfindahl-Hirschman Index (HHI) to measure market concentration, stating that the merger "blew through [HHI] barriers in spectacular fashion,"[13] and concluded, without much analysis, that in these markets, higher market share equals greater bargaining power.[14] The court also rejected ProMedica's argument that the target, St. Luke's, was a "weakened competitor," which, if true, would undercut the significance of the HHI. The "weakened competitor" argument, which harks back to the Supreme Court's decision in *General Dynamics*,[15] is critically important in business environments, such as health care, where there are significant regulatory and competitive changes impacting smaller players more than larger ones. Notwithstanding this reality, the Sixth Circuit concluded that this type of argument is "probably the weakest ground of all for justifying a merger" and the "Hail-Mary pass of presumptively doomed mergers."[16] The court made clear that for the "weakened competitor" argument to have any weight, the acquirer would have to act quickly to acquire a target in dire financial straits, not on the rebound as St. Luke's was thought to be by the court.[17] Lastly, the court carried forth the theme in the Merger Guidelines that efficiencies should be treated with "skepticism" in situations where they are being used to justify the pro-competitive aspects of a transaction. Without elaborating, the court decided that any arguments the parties made regarding efficiencies were insufficient to outweigh the likely adverse competitive effects of the merger. In fact, "ProMedica did not even attempt to argue before the Commission, and does not attempt to argue here, that this merger would benefit consumers (as opposed to only the merging parties themselves) in any way."[18]

Another Significant Win for the FTC in the Health Care Industry and Merger Enforcement

Clearly an important victory in the FTC's health care enforcement agenda, the Sixth Circuit's ruling has broader implications. In particular, it signals a continued heavy reliance by the courts on the Merger Guidelines and builds on other, recent court opinions involving government merger challenges. In addition, the Sixth Circuit's quick dismissal of the "weakened competitor" defense and the parties'

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10 Paradoxically, the "clustering" theory is not recognized under the demand-side approach of the Merger Guidelines. So in this limited sense, the Sixth Circuit seems to have chosen to deviate from the Merger Guidelines.

11 *Id*. at 9.

12 *Id*.

13 *Id*. at 12. Post-merger, ProMedica's share of the primary services (excluding OB) and secondary services market would be over 50 percent and its share of the OB market would be over 80 percent.

14 *Id*. at 14.

15 *U.S. v. General Dynamics Corp.*, 415 U.S. 486 (1974).

16 *ProMedica Health Sys., Inc.* at 18.

17 *Id*.

18 *Id*. at 16.

arguments regarding efficiencies could also have implications for future merger matters. Importantly, it continues the U.S. antitrust agencies' recent winning streak, something merging parties must continue to take into consideration.

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