9th Circ. Must Apply Dynamic Analysis To St. Luke's

Law360, New York (November 13, 2014, 4:29 PM ET) -- On Nov. 19, 2014, the Ninth Circuit Court of Appeals will hear oral argument in what many are considering to be the most significant health care antitrust case in years. The appeal stems from a decision earlier this year by the U.S. District Court for the District of Idaho enjoining St. Luke's Health System Ltd.'s vertical acquisition of Saltzer Medical Group, an independent physician group comprised of 41 physicians including 16 primary care physicians, in Nampa, Idaho.[1]

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Few court decisions have ever expressed such strong ambivalence about its ruling. The court noted the acquisition seemed to be precisely the type of integration necessary to improve health care and control costs — it observed the merger was an attempt to address a "major shift" in health care that, "if left intact," would improve care to patients in Nampa.[2] However, the court ultimately ordered a divestiture after applying a static approach to merger analysis and finding that the acquisition would substantially lessen competition for adult primary care services. The court believed it was compelled to reach that result — but was it right?

The St. Luke's appeal comes on the 40th anniversary of the most influential "forward-looking" U.S. Supreme Court case, United States v. General Dynamics.[3] General Dynamics was the first Supreme Court case in decades in which merging parties successfully refuted a United States' complaint that a merger would substantially lessen competition, and the crucible of the decision was whether the ruler of competition used a static rather than a dynamic measure. The government took a static approach claiming a violation based on existing coal sales suggesting a highly concentrated market.[4] That snapshot provided a misguided view of competition, instructed the Supreme Court, because the acquired firm's reserves suggested they would not be a significant competitor going forward.

The court instructed that merger analysis must take a dynamic forward-looking approach. This forward-looking approach, generally, is still advocated by the enforcement agencies today.[5] But, this type of analysis was not applied by the Federal Trade Commission or lower court in St. Luke's. Instead, the court utilized a static approach particularly inapt in the dramatically changing health care landscape.

The failure to take a dynamic approach is central to the FTC's and the court's error in this case. Each of the central issues in the appeal, the lack of evidence of anti-competitive price effects, the court's fault in dismissing the acquisition's pro-competitive benefits, and mistaken remedy of divestiture, show the error of the static view.[6] When viewed through

the approach established in General Dynamics, it is clear that sound antitrust law and policy and the facts require a reversal.

No Evidence of Anti-Competitive Harm

The Supreme Court's clarion call in General Dynamics was that market share and concentration are helpful tools, but cannot be "conclusive indicators of anticompetitive effects."[7] In St. Luke's, the FTC took what almost everyone saw as a vertical acquisition (a hospital acquisition of a physician practice) and disguised it as a horizontal merger between two physician practices. In doing so, it avoided the decades of antirust jurisprudence that demonstrated that such vertical acquisitions are fundamentally benign. It did so for a simple reason — by creating a horizontal acquisition, it came up with substantial concentration numbers that appeared to compel a conclusion of anti-competitive effects.

Accepting the FTC's sleight of hand, the lower court agreed with the FTC's narrow market definition and found that the combined St. Luke's and Saltzer accounted for 80 percent of the primary care services in the geographic market of Nampa, Idaho.[8] The geographic market seems simply implausible since a substantial portion of Nampa residents work in the nearby cities of Boise and Meridian. Moreover, there was a paucity of evidence of competitive harm. In fact, according to the record, the two largest insurers in Idaho both utilize a "statewide physician fee schedule" that dictates prices for all physician services.[9] Therefore, those insurers have preset prices that will not be changed by any provider party, regardless of mergers or acquisitions.

Secondly, the lower court agreed with the FTC that the acquisition would allow Saltzer to now charge "hospital-based" rates for ancillary services.[10] Yet, there is no evidence that St. Luke's has or will be charging hospital-based rates for Saltzer physicians carrying out ancillary services for patients. In fact, in St. Luke's most recent, post-transaction contract with Blue Cross, defendants received pricing "consistent with previous years," meaning Saltzer physicians will not see a price increase for those services.[11] Moreover, the district court never analyzed or addressed St. Luke's market power within any defined market that included ancillary services. Therefore, while demonstrating debatable market share numbers, the plaintiffs failed to establish harm to competition through any facts or evidence.

For years, the courts have instructed that mere concentration numbers cannot guarantee litigation victories.[12] The snapshot of primary care physician concentration in the small city of Nampa is the core of the FTC's case, and it is simply insufficient to find a substantial lessening of competition.

Pro-Competitive Effects

Few thoughtful observers of our health care system could object to the rationale behind the Saltzer affiliation. There is an urgent need to realign health care systems, increasing integration and coordination among providers, in the effort to improve health care and control costs.[13]

Recognizing these systemic changes, St. Luke's acquired the Saltzer clinics as part of an effort to abandon the siloed, fee-for-service approach to medicine and instead "assemble a team committed to practicing integrated medicine" focused on quality of care, not volume.[14] This type of integration is occurring at a rapid pace, and it is necessary to reform many flaws in the delivery of health care.

While agreeing with St. Luke's that care would be improved, the lower court ultimately rejected the proven efficiencies on the basis that there might be other means to achieve those efficiencies. Without offering any analysis of its efficacy for the parties, the court simply suggested there were less restrictive, alternative models the parties could have utilized.

As others and I have argued elsewhere, this myopic approach is misguided.[15] The facts in this case indicate that the St. Luke's and Saltzer transaction was the optimal model possible to achieve their desired goals of integration. In fact, as noted by the court, on numerous occasions, Saltzer had sought "less-formal affiliations" with other providers in the region that all failed.[16] Furthermore, the courts and enforcement agencies should not be in the business of dictating particular organizational structures.[17] There are innumerable variables in health care affiliations and contracts including abiding with an outdated regulatory structure making non-acquisition transactions impossible for some providers.

Remedies

The purpose of antitrust remedy is to restore competition,[18] and a divestiture is an antitrust remedy of last resort, particularly in health care matters.[19] In General Dynamics, even under the premise of accepting the government's argument, the Supreme Court reasoned that divestiture would not "benefit competition." To alleviate any concerns, St. Luke's suggested the court require St. Luke's and Saltzer negotiate separately with third party payers. However, the lower court, relying on the FTC's suggestion that divestiture was the sole alternative, rejected that proposal.[20]

Again, the facts of St. Luke's indicate that a divestiture would be misguided and contrary to sound competition policy. As noted by amicus public interest groups representing indigent consumers, the transaction already has expanded services to uninsured and underserved patients in Nampa.[21] A divestiture would cut off these services. The defendants have also offered a viable alternative to a full divestiture. Such alternative arrangements have been embraced by New York, Pennsylvania, and most recently Massachusetts wherein the states allowed parties to merge under certain settlement conditions.[22]

Conclusion

The last critical merger appeal heard by the Ninth Circuit almost 25 years ago was United States v. Syufy, in which the court rejected a merger challenge in spite of putative market shares of 100 percent.[23] Relying on the wisdom of the dynamic approach in General Dynamics, the court cautioned that courts should "exercise extreme caution" before dissolving transactions that might promote consumer welfare — lest they achieve the opposite of the pro-consumer goals of the antitrust laws.[24] The principles established in General Dynamics and Syufy remain ever relevant today.

In St. Luke's, the lower court recognized the demands of a rapidly changing health care landscape, and applauded St. Luke's attempts to restructure health care delivery to improve health care, increase access and control costs, but then dusted off a static model of analysis focusing on purported market shares and ultimately ignored the realities of health care and the facts of the case. Such analysis misses the very essence of a changing health care environment seeking integrated entities and collaboration between providers. The lesson of General Dynamics is crucial — the law requires a dynamic analysis. After applying a dynamic analysis to St. Luke's, the conclusion is simple — the acquisition is not anti-

competitive.

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[1] Findings of Fact and Conclusions of Law, FTC v. St. Luke's Health System Ltd., No. 13-cv-00116 (D. Idaho, Jan. 24, 2014).

[2] Id.

[3] 415 U.S. 486 (1974).

[4] Id.

[5] Deborah L. Feinstein, Director, Bur. of Competition, Fed. Trade Comm'n, Advanced Antitrust U.S.: The Forward-Looking Nature of Merger Analysis at 5 (2014), available at http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf.

[6] Brief of Appellants, at 2-3, FTC v. St. Luke's Health System Ltd., No. 14-35173 (9th Cir., June 12, 2014).

[7] 415 U.S. at 498.

[8] Findings of Fact and Conclusions of Law, at 17, FTC v. St. Luke's Health System Ltd., No. 13-cv-00116.

[9] Brief of Appellants, at 37, FTC v. St. Luke's Health System, Ltd., No. 14-35173.

[10] Findings of Fact and Conclusions of Law, at 24, FTC v. St. Luke's Health System Ltd., No. 13-cv-00116.

[11] Brief of Appellants, at 43, FTC v. St. Luke's Health System, Ltd., No. 14-35173.

[12] United States v. Baker Hughes, 908 F.2d 981, 986 (D.C. Cir. 1990) ("market concentration, does not negate the breadth of analysis").

[13] See David Balto, Swimming Against the Tide: The FTC's Misguided Antagonism to Health Care Integration, Truth on the Market (Aug. 26, 2014, 12:00 AM), http://truthonthemarket.com/2014/08/26/swimming-against-the-tide-the-ftcs-misguided-antagonism-to-health-care-integration/.

[14] Findings of Fact and Conclusions of Law, at 2, FTC v. St. Luke's Health System, Ltd., No. 13-cv-00116; see also David Balto, Much Ado About Not Much: 6th Circ. Ruling in ProMedica, Law360.com (May 9, 2014, 10:18

PM),http://www.law360.com/articles/535200/much-ado-about-not-much-6th-circ-ruling-in-promedica; see also David Balto, Ninth Circuit Hits Pause Button on Critical Idaho Hospital Merger, Huffington Post (Aug. 1, 2014, 3:51 PM),http://www.huffingtonpost.com/david-balto/ninth-circuit-hits-pause_b_5642599.html.

[15] See David Balto, Antitrust Enforcement in Reverse: Getting Efficiencies Backwards, Truth on the Market (Sept. 11, 2014, 12:00 AM), http://truthonthemarket.com/2014/09/11/antitrust-enforcement-in-reverse-getting-efficiencies-backwards/.

[16] Findings of Fact and Conclusions of Law, at 8, FTC v. St. Luke's Health System, Ltd., No. 13-cv-00116.

[17] See generally David Balto, An Open Letter to the FTC on Hospital and Providers, The Health Care Blog (Oct. 8, 2014, 12:00 AM), http://thehealthcareblog.com/blog/2014/10/08/an-open-letter-to-the-ftc-on-hospitals-and-providers/#comments.

[18] United States v. E.I. du Pont de Nemours & Co., 366 US 316, 326 (1961).

[19] Evanston Nw. Healthcare Corp, No. 9315, slip op. at 11 (FTC Apr. 28, 2008) (divestiture was not ordered in an already consummated hospital merger because the parties had achieved quality improvements in care).

[20] Findings of Fact and Conclusions of Law, at 49 FTC v. St. Luke's Health System, Ltd., No. 13-cv-00116 (citing In re ProMedica Health Sys., No. 9346, (FTC June 25, 2012).

[21] Brief for Amicus Curiae Medicaid Defense Fund in Support of Motion for A Stay, at 6, FTC v. St. Luke's Health System, Ltd., No. 14-35173 (9th Cir., June 27, 2014).

[22] New York's Utica Hospital Settlement; Pennsylvania's Three Geisinger Settlements; Massachusetts' ongoing Partners HealthCare Settlement.

[23] 903 F.2d 659, 665 (9th Cir. 1990).

[24] Id. at 663.