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Much Ado About Not Much: 6th Circ. Ruling In ProMedica

David Balto

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Already antitrust pundits are declaring the Federal Trade Commission's recent hospital merger victory in the Sixth Circuit in ProMedica Health System Inc. as determinative for all future health care provider merger cases, but any fair assessment of the case would show that those who suggest this is a landmark decision could not be more wrong.
In ProMedica Health System Inc. v. FTC, No. 12-3583 (6th Cir. April 22, 2014), the Sixth Circuit concluded that a horizontal merger between ProMedica Health Systems and St. Luke's community hospital would ultimately harm competition in Lucas County, Ohio. Victory for the FTC should not seem the least bit extraordinary; indeed, this was a highly concentrated market with a weak case on efficiencies and straightforward anti-competitive effects.

On appeal, the defendants made relatively limited arguments, none of which changed or questioned the dynamics of the standards for reviewing health care mergers. The defendants appealed three points: (1) the FTC mistakenly used administrative-convenience theory to define cluster markets, (2) the FTC relied too heavily on the market-concentration data derived from the Herfindahl-Hirschman Index, and (3) defendants had sufficiently rebutted a presumption of competitive harm because St. Luke's was a faltering hospital.

The court determined that a cluster defined via administrative-convenience was appropriate and that the HHI figures were more than relevant especially in a highly concentrated market. Most importantly, defendants never mounted a significant efficiency defense and never attempted to argue "that this merger would benefit consumers." And as to the failing hospital defense, the court said it was no more than a "Hail Mary" defense.

As such, the Sixth Circuit decision was not surprising and did not break new ground. It does not change the legal framework but simply finds a legal violation in a well-trod path. Nor did the case require the court to address any novel legal or policy issues.

So where is the cutting-edge of provider merger enforcement? Hospital-physician group acquisitions. And front and center is the appeal of the district court decision in FTC v. St. Luke's Health System Ltd., No. 13-cv-00116 (D. Idaho, Jan. 24, 2014)[1] considering the Idaho affiliation of St. Luke's Health System with Saltzer Medical Group.

Unlike ProMedica, the St. Luke's case involves a vertical acquisition of a physician practice in a neighboring community. These types of transactions are becoming essential as the health care industry has recognized the need for integration to better coordinate care, to move to value-based delivery of care, and thereby to improve quality while lowering costs. Indeed, the Affordable Care Act incentivizes this type of integration.

In thoughtful detail, the court recognized the need for this consolidation. It noted the compelling forces to integrate to improve the delivery of health care and lower costs. The court stated that St. Luke's "is to be applauded for its efforts to improve the delivery of health care in the Treasure Valley." In its analysis, the court noted the defendants' pro-competitive efficiencies associated with the vertical integration of care. In particular, St. Luke's sought to employ Saltzer's primary care physicians in order to assure transition from the siloed fee-for-service approach to a value-based health care delivery system. The court wrote that in a world "not governed by the Clayton Act, the best result would be to approve the acquisition" and monitor the results.

However, instead of providing a much needed review of the potential efficiencies, the court, without analysis or solid evidentiary support, simply stated that employment of Saltzer physicians was unnecessary to achieve integrated care. There was a suggestion St. Luke's could just contract with physicians. However, contractual arrangements and affiliations between hospitals and physicians are often inadequate to bring efficient integration and are greatly hindered by an outdated regulatory regime that discourages cooperation. Under a contractual agreement, hospitals have much less control over quality initiatives which align incentives for providing better coordinated care more efficiently and the Medicare anti-kickback law stops hospitals from fully aligning incentives.

Along with failing to properly analyze the potential consumer benefits of integrated health

care delivery systems, the court's opinion also struggled with determining the appropriate definition of the geographic market. Even as it defined the relevant geographic market as Nampa, Idaho, the court recognized that nearly one-third of Nampa residents already receive adult primary care physician services outside of Nampa. And that is without any price increase by Nampa physicians. The current level of diversion strongly suggests that substantial numbers of patients would seek adult primary care services outside Nampa if providers were to try to raise prices above competitive levels. Indeed, this is exactly what happened when a large employer in Nampa offered its employees reduced copayments to see physicians elsewhere. The data and the evidence thus point to the conclusion that, contrary to the court's conclusion, the town of Nampa is not the relevant geographic market.

Beyond its specific facts, the case calls upon the court of appeals to address the evaluation of efficiencies in health care transactions. The decision of the court of appeals will have enormous consequences for how health system-physician relationships are structured across America — particularly in small and mid-sized markets. And it will have enormous consequences for efforts to harmonize the antitrust laws with the Affordable Care Act.

Given all of this, it would be ill-advised for pundits to metaphorically spike the football and presume victory in provider health care merger cases post-ProMedica. Instead, the St. Luke's case raises far more challenging issues on efficiencies and market definition in a post-Affordable Care Act world. Simple cases simply do not matter.

—By David A. Balto, Law Offices of David A. Balto

David Balto is a former policy director of the Bureau of Competition of the Federal Trade Commission, attorney-adviser to Chairman Robert Pitofsky and a antitrust lawyer at the U.S. Department of Justice.

[1] St. Luke's Health System of Idaho is not affiliated with St. Luke's community hospital in Ohio.