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Less Than Meets The Eye: Amicus Briefs In St. Luke's

Law360, New York (September 05, 2014, 10:46 AM ET) -- Increasingly in important antitrust cases, parties weigh in with amicus briefs to try to illuminate important issues. The Federal Trade Commission's challenge to the St. Luke's Health System merger, currently before the Ninth Circuit Court of Appeals, the most important pending healthcare antitrust case, drew a chorus of briefs on both sides and for good reason — the case will speak volumes about whether the antitrust laws will hinder the ability of provider integration to produce higher quality, lower cost health care. And a careful analysis of the briefs suggests why those who care about health care reform should be very concerned that the FTC's action and the district court's decision have set us off on an unwise course.[1]

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A brief background: In 2013, the FTC challenged the merger of St. Luke's, the largest hospital in Boise, Idaho, and Saltzer Medical Group, the largest physician practice in Nampa, roughly 20 miles away. To most observers, this seemed like the type of provider integration urged by reform advocates. However, the FTC claimed that St. Luke's would control the physician market in Nampa and calculated allegedly astronomical concentration numbers. What the FTC failed to recognize was that this was a vertical affiliation designed to integrate care and promote a value-based, patient-centric model, improving care and lowering health care costs.

The circumstances of this particular case illustrate why thoughtful health care advocates have raised concerns over the FTC's action. The FTC's challenge creates uncertainty and barriers to provider integration. The record demonstrated significant consumer benefits from the acquisition with greater access especially for the underserved. Even the lower court recognized that the merger would "improve the quality of medical care." And never has an antitrust court expressed such anguish at its decision (it did ultimately rule in favor of the FTC finding substantial concentration in the primary care provider market).

The district court readily "applauded [St. Luke's] for its efforts to improve the delivery of healthcare" throughout the trial and in its written decision. The district court recognized "[t]he Acquisition was intended by St. Luke's and Saltzer primarily to improve patient outcomes." The court further noted the acquisition would "have that effect if left intact."

Among those concerned about the impact the FTC's position could have on the future of health care integration is the Medicaid Defense Fund, a nonprofit public interest consumer group whose mission is to expand public access to affordable and quality healthcare to underserved individuals. They were joined by the International Center for Law and

Economics (ICLE), which submitted an amicus brief in support of St. Luke's.[2] Having a brief filed by a prominent public interest and free-market group is like having breakfast served by Maggie Thatcher and Mother Theresa — with these chefs in the kitchen, you must take notice.

In addition, America's Essential Hospitals, formerly known as the National Association of Public Hospitals and Health Systems, also filed an amicus brief in support of St. Luke's.[3] America's Essential Hospitals represents the safety-net hospitals across the country. Safety-net hospitals are the essential community providers that accept patients regardless of financial status and collectively provide billions of dollars of uncompensated care to low-income uninsured or Medicaid patients, many of whom struggle with complex health and social needs.

A few amicus briefs weighed in support of the lower court's decision. However, there is significantly less here than meets the eye.

First, although the FTC is the leading consumer protection agency within the federal government, consumers were conspicuously silent from supporting their action. No consumer groups filed amicus briefs supporting the FTC. However, the Medicaid Defense Fund, a group who supports the most needy consumers, wrote on behalf of St. Luke's. They demonstrated in their briefs that there are solid consumer benefits from this transaction — the movement away from a fee for service model enables Saltzer physicians to provide greater services to disadvantaged and uninsured patients.

Second, some states filed a joint amicus brief[4] in support of the FTC in which they argued that integration generally will lead to higher prices for health insurers. That thousand-foot observation says little about the Idaho market or the impact on the ultimate consumer. Moreover and most importantly, notably absent from this brief is the support of the states that are most actively involved in hospital merger enforcement — Massachusetts, New York and Pennsylvania.

These states are three of the four most active antitrust states with the largest antitrust divisions. Their absence from the state amicus brief is noteworthy, because each of these three states has grappled with large difficult hospital mergers over the past few years, and ultimately decided in several cases this type of integration should occur. However, these states did impose post-merger requirements on the merged firms to ensure the acquisitions' benefits to consumers.

Third, no one was the least bit surprised to see the health insurance association weigh in.[5] But their criticisms are very modest, essentially stating that St. Luke's analysis of the benefits of integration is wrong. Despite the health insurance association's analysis, St. Luke's stated and the district court's agreed that more individuals are able to access quality health care services as a result of the affiliation between St. Luke's and Saltzer.

Both the health insurance association and the states suggested there were theoretically less restrictive ways for St. Luke's to achieve the benefits of integration, such as a joint venture with insurers. But, as St. Luke's reply brief noted, the leading insurer had rejected that approach with the Saltzer group.[6] In any court, market realities trump theory.

Finally, we have the battle of antitrust experts. There is a group of economists[7] that support the FTC on the importance of concentration and the lack of efficiencies. But again these are general observations — not specific to the facts of the St. Luke's-Saltzer relationship. The economists failed to analyze the specific claimed efficiencies in this matter,

over-generalizing all hospital acquisitions of physician provider groups. On the other hand, the ICLE demonstrated how the lower court erred by applying an incorrect legal standard of efficiencies and ignoring practical obstacles to alternative means of achieving the efficiencies the district court found the parties had demonstrated.

At the end, the FTC and its supporters have relied on general economic theory, but it is the real-world facts that matter. And those facts tell a simple story: The acquisition has led to significant benefits that must be recognized in any sound analysis — and is unlikely to lead to anti-competitive pricing or other anti-consumer consequence.

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[1] For more on that, see my post on Truth on the Market: http://truthonthemarket.com/2014/08/26/swimming-against-the-tide-the-ftcs-misguided-antagonism-to-health-care-integration/

[2] http://dcantitrustlaw.com/assets/content/documents/Amicus/2014/St lukes amicus.pdf

[3] http://2c4xez132caw2w3cpr1il98fssf.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/St.-Lukes-Amicus-Brief-Filed-Version.pdf

[4] http://www.ftc.gov/system/files/documents/cases/140820statesbrief.pdf

[5] http://www.ftc.gov/system/files/documents/cases/140820ahipbrief_3.pdf

[61] Reply Brief at 23, FTC v. St. Luke's Health Sys., No 14-35173 (9th Cir. Sept. 2, 2014).

[7] http://www.ftc.gov/system/files/documents/cases/140820healthcareeconomistsbrief.pdf

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