Antitrust lessons from recent FTC successes in challenging hospital acquisitions in Ohio and Idaho

May 8, 2014

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One significant trend in the health care industry is an increase in consolidations of health care providers. Though there are various forms of consolidation and many reasons for these changes, the fact is that these consolidations are expected to continue. Part of this consolidation trend is hospitals acquiring other hospitals or hospitals acquiring physician practices and employing those physicians. The Federal Trade Commission (FTC) successfully challenged two of these recent acquisitions, claiming they significantly increased market power in the combined entities, thereby violating the antitrust laws.

The FTC successfully challenged the acquisition of St. Luke's Hospital — a community hospital in Lucas County, Ohio — by ProMedica Health System, which has three hospitals in the Toledo area. There are two other competing hospital systems that operate in the Toledo area. A U.S. District Court issued a preliminary injunction to hold separate the operation of St. Luke's Hospital while the case proceeded through litigation.

Litigation before an administrative law judge resulted in a finding that the acquisition violated the antitrust merger laws and an order of divestiture, which the FTC then reviewed on appeal and ordered divestiture. The Sixth Circuit Court of Appeals affirmed on April 22, 2014, and issued an order of divestiture.[1]

A significant point arising from the FTC's success in the ProMedica case is the fact that two product markets were determined for purposes of the merger review — the general acute-care services market and the obstetrics market. There was no dispute on the geographic market, as it was agreed between the FTC and the defendant that the relevant geographic market was Lucas County.

The antitrust issue was whether, in either market, the acquisition of St. Luke's Hospital provided a post-merger concentration level that would result in market power such that the commercial payors purchasing medical services would have no choice but to yield to the market power of the combined ProMedica/St. Luke's entity

if prices were raised above a competitive level. Among other evidence, the FTC introduced testimony of commercial plans that opposed the acquisition because it would create market power, and internal documents from the merging parties that arguably indicated that the intent of the proposed merger was, and the result would be, to create leverage to raise prices.

The other recent FTC success was in an Idaho case that challenged St. Luke's Health System's acquisition of a large multi-specialty physician group. The FTC and the State of Idaho (hereafter referred to collectively as FTC) challenged the physician acquisition, alleging that the primary care physicians within that group gave St. Luke's market power in the primary care physician services product market.

The case was tried in the U.S. District Court in Idaho, after being consolidated with a separate antitrust suit filed by a competing hospital system, St. Alphonsus Medical Center, Nampa, Inc., that also alleged that the acquisition of the physician group violated the antitrust laws because it created market power in the primary care physician market.

The FTC and the defendant agreed that the product market for antitrust purposes was adult primary care physician services covered by commercial plans. The market issue in dispute was the relevant geographic market. The defendant argued that the geographic market should include Nampa and Boise, Idaho, whereas the FTC argued that Nampa was the appropriate geographic market to assess the market impact of the acquisition of the primary care physicians. The court sided with the FTC, and found Nampa as the appropriate geographic market for the antitrust analysis.

After a lengthy trial, the court concluded that the acquisition of the physician group would give St. Luke's market power in the relevant market, and that the defendant did not provide sufficient evidence of efficiencies arising out of the merger that would outweigh any anti-competitive effects from the acquisition, and therefore found for the FTC. The court also found that there was no ease of entry of new primary care physicians entering the Nampa market because evidence showed that recruiting primary care physicians to Nampa had been difficult in the past. The court ordered divestiture.[2]

The case is on appeal, but it does provide insight into how these cases are likely to be handled by the enforcement agencies. So, what are the lessons from the above two recent successes by the FTC? The most significant are:

1. The FTC will review and challenge mergers of varying sizes and dollar value in the health care industry.
2. The FTC will attempt to narrowly define the product market and/or the geographic market, and these definitions may be accepted by the courts.
3. In both cases, the FTC introduced into evidence testimony from managed care plans that were opposed to the merger on the basis that it would create market power that cannot be countered by the managed care plans

substituting other hospitals and/or physicians in the geographic area.

4. In both cases, the FTC introduced into evidence internal documents of the defendants that included statements, to the effect, that the purpose of the acquisition was to gain "leverage," "market power," "bargaining strength" and/or "higher prices."
5. As a possible defense to justify an otherwise significant increase in market power, one can put into evidence the efficiencies arising out of the acquisition. However, any argument that significant efficiencies will result from the acquisition must involve efficiencies that can be obtained only through the merger and are not available through any other form of business relationship between the parties. Neither the enforcement agencies nor the courts will accept efficiencies that can be obtained otherwise.

The bottom line is:

1. Be prepared. That is, begin as early as practical to prepare to address the issues likely to be raised if the federal or state antitrust enforcement agency, at some point, notifies you that they are investigating your anticipated acquisition.
2. Monitor each party's internal documents and the consultant reports to avoid comments that could be interpreted as supporting an anti-competitive intent for the acquisition. Make sure the comments and description of the transaction and its effects on the market are pro-competitive or at least neutral.
3. Don't assume that because your transaction is a small transaction or because other competitors are in the market, it will not be subject to review. Whether it is the proposed acquisition of a hospital or a group of physicians, the proposed acquisition still may be subject to review and possibly a challenge.

Footnotes

1. Opinion can be found at www.ca6.uscourts.gov/opinions.pdf/14a0083p-06.pdf.
2. Saint Alphonsus Medical Center-Nampa and Fed. Trade Comm'n, et al. v. St. Luke's Health System and Saltzer Medical Group (Memorandum and Decision, available at www.ftc.gov/sites/default/files/documents/cases/140124stlukesmemodo.pdf and Findings of Fact and Conclusions of Law available at http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf.