

Appellate Court upholds divestiture after health care system acquires large physician group

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The FTC's win streak rolls on. On February 10, 2015, the [United States Court of Appeals for the Ninth Circuit](#) (Ninth Circuit) affirmed a district court judgment in favor of the Federal Trade Commission (FTC), the State of Idaho, and private plaintiffs, holding that a challenged acquisition involving two health care providers in Nampa, Idaho, violated § 7 of the Clayton Act.

Facts: The case involved the St. Luke's Health Systems, Ltd. (St. Luke's) acquisition of Saltzer Medical Group, P.A. (Saltzer). Saltzer was the largest independent multi-specialty physician group in Idaho, consisting of 34 physicians practicing at its offices in Nampa. Prior to the merger, St. Luke's operated an emergency clinic in Nampa with the only hospital in Nampa being operated by the unrelated Saint Alphonsus Health System, Inc. Particularly relevant to the Court's analysis in this case was the adult primary care physician market in Nampa, Idaho. Saltzer was the largest adult primary care physician provider in Nampa, with 16 primary care physicians. St. Luke's had eight primary care physicians in Nampa and Saint Alphonsus had nine.

In 2012, St. Luke's acquired Saltzer's assets and entered into a professional services agreement with the Saltzer physicians. The merger did not require Saltzer physicians to refer patients to St. Luke's Boise hospital (Boise is located approximately 20 miles from Nampa), nor did it require Saltzer physicians to use St. Luke's facilities for ancillary services. In March 2013, the FTC and the State of Idaho filed a complaint in district court seeking to enjoin the acquisition pursuant to the Federal Trade Commission Act, the Clayton Act, and Idaho law. The FTC's suit was consolidated with an earlier suit initiated by private plaintiffs. After a 19-day bench trial, the Court found the acquisition was prohibited by the Clayton Act and Idaho law due to the anticompetitive effects the acquisition was likely to have on the Nampa adult primary care physician market.

Key Point: This Opinion is noteworthy for several reasons, not the least of which is that the Ninth Circuit affirmed the district court's order of divestiture despite the fact that the Ninth Circuit acknowledged that the district court "noted the troubled state of the U.S. health care system, found that St. Luke's and Saltzer genuinely intended to move toward a better health care system, and expressed its belief that the merger would 'improve patient outcomes' if left intact." The Ninth Circuit also stated that "Saltzer had long had the goal of moving toward integrated patient care and risk-based reimbursement."

The Clayton Act bars mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The Clayton Act analysis requires that the plaintiff, in this case the FTC, to first establish a prima facie case that a merger is anticompetitive, and then the burden shifts to the defendant to rebut the prima facie case.

Key Point: The Ninth Circuit refused to disturb the district court's determination that the relevant geographic market was limited to the Nampa market. The Court noted that testimony revealed Nampa residents "strongly prefer access to local primary care physicians" and that "commercial health plans need to include Nampa primary care physicians." However, the Court also acknowledged that evidence was presented that one-third of Nampa residents travel to Boise for primary care physicians, but the Court concluded that such evidence did not prove a significant number of other residents would also travel in the event of a price increase. Accordingly, the Court stated the district court's determination that Nampa was the relevant geographic market was not clearly erroneous and was permitted to stand.

Key Point: Once the relevant geographic market was determined, the Court turned its attention to whether the merger would “probably lead to anticompetitive effects in that market” (*i.e.*, the Nampa market). The Court evaluated market share through the use of a commonly used metric for calculating market share. Based on those calculations, the Court stated the district court correctly determined that the analysis’ results “are well above the thresholds for a presumptively anticompetitive merger (more than double and seven times their respective thresholds respectively.)” The Court also refused to disturb the district court’s conclusion that based on the post-merger market share St. Luke’s would likely have the power to negotiate higher reimbursement rates from insurers for its primary care physician services.

Based on the large market share and the potential ability for St. Luke’s to negotiate higher primary care physician reimbursement rates following the St. Luke’s-Saltzer acquisition, the Court concluded that the FTC established a *prima facie* case of a Clayton Act violation. Specifically, the Court noted that “Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.”

Key Point: The defendants were then forced to attempt to rebut the *prima facie* showing through demonstrating post-merger efficiencies. The Court began its analysis by stating that “the Supreme Court has never expressly approved an efficiencies defense to a § 7 claim.” Starting from that point, the Court went on to affirm the district court’s finding that St. Luke’s efficiencies defense was insufficient. Specifically, the Court pointed out that it was not enough to merely demonstrate that the merger would allow St. Luke’s to better serve its patients. Instead the Court stated that because the Clayton Act focuses on competition, and St. Luke’s was unable to show that the proposed acquisition would increase competition or decrease prices, St. Luke’s efficiency defense was not supported by the record. Finally, the Court also noted that St. Luke’s alleged efficiencies were not merger specific because the benefits could be obtained without the acquisition.

Key Point: Finally, after upholding the district court’s decision regarding St. Luke’s inability to demonstrate merger specific efficiencies, the Court also affirmed the remedy of divestiture. In doing so, the Court also stated that “the customary form of relief in § 7 cases is divestiture.”

Bottom Line: This case should be examined by any health care provider who is anticipating a merger with another health care provider. The FTC has recently become more active in challenging such proposed mergers in the health care setting and has become more successful in doing so. Any contemplated merger that has the potential to significantly increase a health care provider’s market share should be analyzed as early as possible to determine whether the proposed transaction might come under scrutiny. The earlier such analysis occurs the better position such health care providers will be in to potentially respond to a possible FTC challenge.

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