KUTAK ROCK LLP

Health Care, Antitrust and Mergers & Acquisitions Client Alert

February 12, 2015

Ninth Circuit Upholds St. Luke's-Saltzer Divestiture

The Ninth Circuit has affirmed the order (*FTC v. St. Luke's Health System*, No. 13-cv-00116 (D. Idaho Jan. 24, 2014)) requiring St. Luke's Health System to divest its recently acquired physicians group Saltzer Medical. *St. Alphonsus Medical Center v. St. Luke's Health System*, __ F.3d __, No. 14-35173 (9th Cir. Feb. 10, 2015). Although it is inevitable that much ink will be spilled over this opinion, a few take-aways merit immediate attention.

First, mergers with values of less than the Hart-Scott-Rodino (Clayton Act § 7A, 15 U.S.C. § 18a) notification threshold (this year, $76.3 million; the St. Luke's-Saltzer transaction was valued at $9 million) are subject to and may be found to violate the substantive antitrust laws, in this case Clayton Act § 7, 15 U.S.C. § 18 ("may be substantially to lessen competition or tend to create a monopoly"). Simply, even a transaction not subject to an HSR filing requirement may raise, and thus need to be reviewed for, substantive antitrust issues.

Second, a transaction with little or no immediate market impact, or even one with potential positive market results, may violate the antitrust laws. Here, St. Luke's and Saltzer had been informally affiliated prior to the challenged transaction, and the transaction did not require Saltzer physicians to refer patients to St. Luke's or use it for ancillary services. Both the district court and the court of appeals noted that the transaction was intended to and may well improve patient outcomes. Nonetheless, the Court found that, in the limited geographic market it upheld, the rise in concentration (HHI's going up 1600 points to over 6200; well above the DOJ guideline of 2500 for a highly concentrated market) was sufficient to find a prima facie case of substantially lessening competition (here, giving the merged entity potential power to raise prices to insurers). While noting that predictions about the future were inherently difficult (and pointing out the dispute as to whether the probably apocryphal saying should be attributed to Yogi Berra or Niels Bohr), the Court found this sufficient to meet the Clayton Act standard. Thus, even a transaction structured with clinical efficiencies and non-exclusive relationships (often thought of as passes to meeting the rule of reason in health care mergers) might not be sufficient to avoid substantive antitrust violations, at least in concentrated markets.

Finally, you *can* unscramble eggs. The Ninth Circuit found that the purpose of the remedy in a merger case was to restore pretransaction competition, and that divestiture was the customary, and when the government was a plaintiff, the preferred way to do so. St. Luke's argued that a post-divestiture Saltzer would not be an effective competitor and that conduct-based relief (mandating separate bargaining for the hospital and the physicians) could protect competition (arguments which were undermined by its previous position in the district court that divestiture would be feasible). Although indicating other remedies may have been possible, the Ninth Circuit upheld the district court's divestiture order as a reasonable exercise of discretion. Thus, parties should not take comfort in merely getting a deal to closing as insulating them from substantive antitrust review and unwinding.

While the future may indeed be unpredictable, it seems certain that there will be more consolidations and mergers among health care providers. The Ninth Circuit's opinion in *St. Alphonsus v. St. Luke's* provides a good roadmap of potential antitrust issues and a clear warning against simplistic assumptions that everything will somehow work out.

Additional Information

For more information on this and other merger and acquisition and health care antitrust matters, or if you have an upcoming merger or affiliation in the health care industry, please contact Robert A. Jaffe or your Kutak Rock attorney. Mr. Jaffe has longstanding experience and expertise in health care antitrust matters and analyzes transactions to determine if they present substantive antitrust issues and assists with structuring transactions to meet our clients' business needs while avoiding such substantive issues.

Robert A. Jaffe
(202) 828-2434
www.KutakRock.com/Robert-Jaffe
Robert.Jaffe@KutakRock.com

Kutak Rock LLP | 1101 Connecticut Avenue, NW, Suite 1000 | Washington, D.C. 20036-4374 | (202) 828-2400