



June 13, 2019

## U.S. Court of Appeals Upholds Blocking of Healthcare Merger in North Dakota

The U.S. Court of Appeals for the Eighth Circuit upheld an injunction obtained by the Federal Trade Commission (FTC) blocking an acquisition of a multi-specialty physician group by an integrated healthcare system operating in the Bismarck, North Dakota area. *Federal Trade Commission v. Sanford Health*, No. 17-3783 (8th Cir., Jun. 13, 2019).

*Sanford Health* shows the FTC's continuing interest in challenging even relatively small acquisitions in the healthcare field, where the acquisition would lead to a concentration of market power (presumptively measured by market share), in smaller geographic markets, and its continuing focus on concentration within medical specialties; as well as a continuing judicial willingness to review and enjoin such transactions upon an appropriate showing of market concentration.

The acquiring company in the challenged transaction, Sanford Health, employs approximately 37 adult primary care physicians, 5 pediatricians, 8 OB/GYN physicians, and 4 general surgeons in the area. The target, Mid Dakota Clinic, P.C., includes approximately 23 adult primary care physicians, 6 pediatricians, 8 OB/GYN physicians, and 5 general surgeons (approximately 60 doctors total). The remaining competitor, Catholic Health, employs 88 physicians, the majority of whom are hospitalists; 5 are adult primary care physicians. With the proposed acquisition, the combined entity would have 99.8% of general surgeon services, 98.6% of pediatric services, 85.7% of adult primary care physician services, and 84.6% of OB/GYN physician services in the Bismarck area.

The FTC and the State of North Dakota sued to block the merger under Section 7 of the Clayton Act, 15 U.S.C. § 18, claiming it would substantially lessen competition for the four concentrated medical services. The U.S. District Court found the combined market shares raised a *prima facie* showing that the merger would result in an undue market concentration, creating a presumption that the merger will substantially lessen competition, and found that Sanford Health had failed to successfully rebut the presumption. The Court of Appeals rejected that the District Court had placed the ultimate burden of persuasion on the acquiring party by using the *Baker Hughes* burden-shifting test. See *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (which shifts the burden of persuasion back to the plaintiff to present additional evidence of anticompetitive effects in the event of a sufficient rebuttal of the *prima facie* showing by the defendant).

The Court of Appeals also rejected an argument that Blue Cross Blue Shield of North Dakota's 61% share of the commercial insurance market made it immune to a price increase by the merged entity, or that any such buyer strength defeated the showing of market power. The Court also rejected as reasons to permit the merger: (i) alleged efficiencies, finding all but one were not merger-specific; (ii) potential new entry, finding that any such entry would not occur soon enough to be an effective bar to use of monopoly power by the combined entity; and (iii) a weakened competitor defense, based on a finding that the target was in fact financially healthy (evidence showed target's revenue had increased in the last 3 years, its physician compensation was 32% above the national average, and shareholder meeting minutes showed the sale was motivated by high share value – not long-term viability concerns).

## Additional Information

Kutak Rock LLP is a nationwide law firm offering antitrust and other legal services to clients in health-care and other industries and in particular has represented numerous hospitals and healthcare providers in merger, acquisition and joint-venture transactions, including structuring and pre-closing advice and analysis and filings under Hart-Scott-Rodino. The firm also regularly represents clients in litigation matters, regulatory inquiries and disputes, and related proceedings. For more information on this alert and other healthcare or antitrust matters – including advice on antitrust issues in transactions below the Hart-Scott Rodino filing threshold – please contact one of the undersigned authors or any member of Kutak Rock’s [Healthcare](#) or [Antitrust](#) Groups.

### Contacts

Robert Jaffe	Washington, D.C.	(202) 828-2434	<a href="mailto:Robert.Jaffe@KutakRock.com">Robert.Jaffe@KutakRock.com</a>
Nicole Moriarty	Washington, D.C.	(202) 828-2446	<a href="mailto:Nicole.Moriarty@KutakRock.com">Nicole.Moriarty@KutakRock.com</a>

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