
Loose Lips Sink Ships and Careless E-mails Torpedo a Transaction

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What you are stands over you the while, and thunders so that I cannot hear what you say to the contrary. Ralph Waldo Emerson.

Federal antitrust laws prohibit hospital systems, like other businesses, from using a dominant market position to exclude competitors and restrain trade. Recently, e-mail communications exchanged between a hospital system and a physician group helped convince a federal judge to unwind a hospital system's completed acquisition of a physician practice.

St. Luke's Health System, Ltd. ("St. Luke's") is a not-for-profit health system that owns and operates seven hospitals in Idaho and eastern Oregon. Saint Alphonsus Health System, Inc. is St. Luke's competitor. It joined with another hospital to form an outpatient surgery center in the St. Luke's service area. The two systems vied for referrals from Saltzer Medical Group, P.A. ("Saltzer") the largest, independent multi-specialty physician group in Idaho. In 2008, St. Luke's decided to acquire the Saltzer group.

Meanwhile, the Federal Trade Commission ("FTC") and the Idaho Attorney General began an investigation of the intended acquisition and requested that St. Luke's delay the transaction while the investigation was pending. Nonetheless, St. Luke's proceeded with the closing, and the St. Luke's-Saltzer entity became the largest provider of adult primary care services in Nampa, Idaho. Subsequently, the FTC and St. Luke's competitors filed an antitrust lawsuit to unwind the deal.

The FTC alleged that the acquisition eliminated competition between Saltzer and the primary care physicians employed by St. Luke's. It also alleged that St. Luke's market power would prevent the area's competing hospitals from obtaining physician referrals and drive up prices.

Although the Court acknowledged that the health care industry is moving toward a more integrated system, it was concerned that the added leverage would permit the hospital system to negotiate higher reimbursement rates from health plans.

The evidence produced by the FTC and St. Luke's competitors included e-mails from St. Luke's Chief Executive Officer ("CEO") to its Chief Financial Officer and Chief Operating Officer. The email discussed revenue and volume shortfalls in 2011 and

outlined a plan for improvement: "Pressure Payors for new/directed agreements."

In court, the CEO asserted that he did not mean that St. Luke's could pressure payors for higher reimbursement, but rather that it could pressure them to direct more patients to St. Luke's high quality and low cost clinics. The Court was not convinced, however. The Court pointed out that the "pressure" language was contained under a heading entitled "Price Increase" and was part of a discussion on how to increase income. Similarly, in an internal e-mail exchange the Saltzer CEO stated that if the negotiations with St. Luke's went well, "there would be the clout of the entire network."

Relying upon this and other evidence, the Court concluded that the acquisition violated Section 7 of the Clayton Act and the Idaho Competition Act, and it ordered St. Luke's to fully divest itself of Saltzer's physicians and unwind the acquisition. While these e-mails may not have been the sole basis of the Court's decision, they implied that the purpose of the acquisition was to decrease competition and raise prices rather than improve patient service and quality.

The lesson of this story is clear: Be cautious when sending communications that discuss competitive strategy. Words such as "leverage," "pressure," "clout," or "advantage" may be misconstrued in a courtroom. Communications about integration strategy should always stress the true goals of patient satisfaction, increased efficiency, and improved outcomes.



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