

Client Alert

Antitrust & Litigation Practice Group

March 30, 2012

Federal Trade Commission Upholds Challenge to ProMedica's Acquisition of St. Luke's

On March 28, 2012, the FTC upheld the Administrative Law Judge (ALJ)'s December 5, 2011 administrative decision that required ProMedica to divest itself of St. Luke's Hospital by a vote of 4-0. This case is part of a series of recent cases brought by the FTC in the health care sector, indicating a continuing trend of heightened FTC scrutiny of provider combinations.

Toledo, Ohio-based ProMedica acquired St. Luke's, located in Maumee, Ohio, in August 2010 in a non-reportable acquisition. In January 2011, the FTC announced its intent to challenge the \$156 million acquisition, which, according to the FTC, gave ProMedica control of nearly 60% of the market for general acute-care inpatient hospital services and over 80% of the market for obstetrical services. In March 2011, the U.S. District Court for the Northern District of Ohio enjoined the transaction. On December 5, following a full administrative trial on the merits, an ALJ concluded that the transaction would "substantially lessen competition," in violation of Section 7 of the Clayton Act. ProMedica appeals that decision to the Commission (currently there are four FTC Commissioners).

Commissioner Julie Brill wrote the Commission's Opinion. Key elements of the Opinion include:

- A finding that ProMedica's acquisition of St. Luke's was presumptively illegal and would "significantly harm patients, employers, and employees in the Toledo area" by eliminating competition between the hospitals and increasing costs, especially in the obstetrical services market.
- A rejection of ProMedica's argument that St. Luke's was a sufficiently weakened competitor to provide support for allowing the transaction to proceed; and
- A market definition somewhat different from the ALJ's decision; unlike the ALJ's decision, the Commission excluded "tertiary" services from its market definition of general acute-care inpatient hospital services.

With respect to the remedy, the Commission issued an Order requiring ProMedica to divest St. Luke's to an approved buyer within 180 days of the date its Order becomes final and effective. The Commission's Order requires,

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among other things, that ProMedica take all actions necessary to ensure that the acquirer can operate St. Luke's in "substantially the same manner" as it had been during its joinder with ProMedica, and if ProMedica has not divested St. Luke's within the time required, the FTC may appoint a trustee to sell the assets in a manner that complies with the terms of the Order.

Interestingly, Commissioner Rosch issued a concurring opinion in which he agreed with the majority regarding liability and the remedy, but, unlike the Commission, would have affirmed the ALJ's findings that the general acute-care inpatient hospital services product market includes tertiary services. He also disagreed with the ALJ on the "willingness-to-pay" economic model as evidence of likely post-merger unilateral effects.

ProMedica may appeal the Commission's Decision to the Sixth Circuit Court of Appeals. Although the ultimate outcome of this case is yet to be determined, this is a significant victory for the FTC and reaffirms that provider combinations in concentrated markets will continue to receive significant FTC scrutiny.

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