

Antitrust Alert

APRIL 23, 2014

Antitrust Hospital Merger Policy Gets a Judicial Boost — Sixth Circuit Upholds FTC Decision Challenging Hospital Merger

BY [BRUCE SOKLER](#), [HELEN KIM](#), AND [TIMOTHY SLATTERY](#)

In a highly anticipated decision, the federal antitrust agencies' reinvigorated hospital merger enforcement efforts received a boost when, for the first time this century, an appellate court upheld a Federal Trade Commission (FTC) decision condemning a hospital acquisition and ordering full divestiture of the acquired assets. *ProMedica Health System, Inc. v. FTC*, No. 12-3583, 2014 U.S. App. LEXIS 7500 (6th Cir. Apr. 22, 2014). In a unanimous opinion, the Sixth Circuit held that the FTC correctly decided that ProMedica Health System, Inc.'s purchase of St. Luke's Hospital in Lucas County, Ohio would substantially lessen competition in the highly concentrated relevant product markets for primary and secondary acute care services and also for obstetrics. The case did not present a contested issue of the relevant geographic market, which frequently has tripped up the FTC (and DOJ) in previous hospital challenges, nor were any efficiencies or pro-consumer benefits advanced by the parties for the Court to balance, issues which would likely be pivotal in future cases. However, for now, where the Court found the Commission's analysis to be "comprehensive, carefully reasoned, and supported by substantial evidence in the record," *ProMedica* will provide antitrust enforcers a strong boost toward continuing their close scrutiny of health care provider mergers.

Background

ProMedica acquired St. Luke's in August 2010 under a Hold Separate Agreement with the FTC, which allowed ProMedica to close the transaction, but limited its ability to control St. Luke's. The FTC challenged the merger five months later, alleging that after the deal, ProMedica became Lucas County's dominant hospital provider, controlling more than 50% of the market for primary and secondary services and more than 80% of the market for obstetrical services. In its March 28, 2012 decision, which followed an administrative trial at the agency, the FTC ordered ProMedica to divest St. Luke's. *In the Matter of ProMedica Health System, Inc.*, 2012 FTC LEXIS 58, FTC Docket No. 9346 (Mar. 28, 2012). ProMedica appealed, arguing the FTC's analysis of the merger's competitive effects was incorrect.

In a decision rooted in relevant product market and market power analysis,¹ the Sixth Circuit held that the merger would increase ProMedica's pricing and bargaining power without creating any procompetitive efficiencies to offset these anticompetitive effects, and further determining that no substantive or compelling efficiencies were created by the merger.

Product Market Analysis

Since the parties rejected at the outset the idea that each individual medical procedure performed in the hospital would give rise to a separate market, the question was how to group together or "cluster" the procedures to define a relevant product market. Antitrust principles require a relevant product market to identify a "reasonably interchangeable" set of products. The FTC suggested that there was no need to conduct separate analyses for

separate markets “when competitive conditions are similar” in each market. ProMedica, on the other hand, argued that the relevant market constituted the services that customers preferred to receive as a package deal.

Adopting the FTC’s “similar-conditions” analysis, the Court held that the product market included primary and secondary services (but not obstetrics) because the four competing hospital systems in the area had similar market shares for those services and the barriers to entry for specific procedures were similar. Notably, the Court also upheld the FTC’s conclusion that obstetrics constituted a separate market because a pre-merger ProMedica held a disproportionately high market share and only three hospital systems provided obstetrics services before the merger; this is the first hospital merger case where the government successfully argued in court for a distinct service line product market.

The Court summarily rejected ProMedica’s “package-deal” clustering theory, in which ProMedica sought to include tertiary and obstetrics services, because: (1) managed care organizations (MCOs) did not demand a package from each hospital to include tertiary and obstetrics services, and (2) MCOs sought the complete package, including tertiary and obstetrics services, from disparate providers rather than a single provider. The true death knell to ProMedica’s argument, however, was its own admission that tertiary services were “properly excluded from the relevant market.”

Market Concentration Analysis

After defining the relevant product market, the Court addressed ProMedica’s claim that the FTC’s reliance solely on Herfindahl-Hirschman Index (HHI) calculations for market concentration was insufficient to warrant the presumption that the merger was unlawful. Although the Court acknowledged that ProMedica’s argument that measuring HHI to apply a presumption of illegality is only appropriate in a “coordinated-effects” case — and not a “unilateral-effects” case such as that alleged by the FTC — was “one to be taken seriously,” it ultimately sided with the FTC due to the “exceptional” nature of the case. First, the Court found that the strong correlation between ProMedica’s market share and its prices could not be explained by better quality care or lower costs; instead, it could only be explained by ProMedica’s bargaining power and because a provider building a network could not successfully do so without contracting with ProMedica. Second, the Court found the HHI numbers themselves to be so “exceptional” — with the HHIs exceeding the ceilings by several multiples — that, “as a matter of simple mathematics,” it was extremely likely that a significant proportion of patients viewed ProMedica and St. Luke’s as close substitutes and the FTC was “entitled to put significant weight upon the market-concentration data standing alone.”

* * * *

After agreeing with the FTC’s finding that the merger was presumptively unlawful, the Court addressed (and rejected) ProMedica’s rebuttal arguments. Most significantly, the Court observed that ProMedica failed to argue that the merger would enhance consumer welfare. ProMedica made no claim that the merger would allow for the creation of a robust population health management program, for increased efficiency and lower costs, or for development of localized tertiary or quaternary care in southwest Lucas County. Instead, ProMedica seemingly conceded that the merger would have no procompetitive benefits and the Sixth Circuit found this “only diminshe[d] ProMedica’s prospects” of evading antitrust liability. And finally, the Sixth Circuit lambasted ProMedica’s “weakened competitor” argument as the “Hail-Mary pass of presumptively doomed mergers,” noting that St. Luke’s market share was rising prior to the merger, it had sufficient cash to cover its obligations, and it was profitable after the newly minted CEO implemented extensive overhauls.

This decision follows a string of successfully litigated hospital merger challenges by the FTC, including the Idaho federal district court’s order of complete divestiture of St. Luke’s acquisition of a large physician group following a similar challenge by the FTC. *FTC v. St. Luke’s Health System, Ltd, and Saltzer Medical Group*, No. 13-0116, 2014 U.S. Dist. LEXIS 9264 (D. Idaho Jan. 24, 2014). That case is currently under appeal and does raise issues of geographic market definition and pro-consumer efficiencies. *ProMedica* does not pave much new ground at all, and perhaps it is most notable that in a health care market context, particularly in light of the complex policies in health care reform, the case looks like a run-of-the-mill very high market share merger decision.

[View Mintz Levin's Antitrust attorneys.](#)

Endnotes


¹ The Court did not question the parties' agreement that the relevant geographic market was Lucas County.

Boston · London · Los Angeles · New York · San Diego · San Francisco · Stamford · Washington

www.mintz.com

Follow Us



 **Feedback:** Was this mailing helpful?

Copyright © 2014 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

Your e-mail address is never shared with any third parties. For more information, view our [Privacy Statement](#).

[Sign up here](#) to receive periodic e-mails notifying you of new publications, news, and events in your areas of interest.

3921-0414-NAT-AFR