Saint Alphonsus v. St. Luke's: A Shield for Threatened Hospitals?

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Introduction

The *Saint Alphonsus v. St. Luke's* case, in which I was lead counsel for the prevailing private plaintiffs, has received substantial attention. But one important aspect of the case has not: the claim by the private plaintiffs that the acquisition by St. Luke's would violate the antitrust laws by controlling referrals from the acquired physician group.

This issue may deserve serious consideration by hospitals concerned about the acquisition of major physician groups by their rivals, as well as hospitals already suffering from the effects of such acquisitions. While the antitrust laws in the first instance protect the interest of customers such as managed care plans, under the right circumstances, they can also protect competing hospitals. As Judge Winmill found in *St. Luke's*, "patients largely accept the recommendations of their primary care physician as to what hospital, specialist, and ancillary services they should use." *Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, Nos. 1:12-CV-00560-BLW; 1:13-CV-00116-BLW, 2014 WL 407446, at *13 (D. Idaho Jan. 24, 2014). When those physicians' recommendations change as a result of an anticompetitive acquisition, the aggrieved parties may have a significant antitrust claim.

These concerns have also been noted on a number of occasions in the health care literature. For example, the Berkeley Forum Study concluded that the recent trend of physician

employment by hospitals increases costs because "physicians may be influenced by hospitals to . . . increase referrals and admissions."[1]

We presented this "vertical" theory in detail at trial in *St. Luke's*. It was ultimately not completely resolved by the District Court, because the Court found that it was not necessary to do so in order to conclude that the transaction was illegal. The Court did, however, find that the transaction would cause referrals to shift, and that this was one of its "anticompetitive effects." ("After the Acquisition, it is virtually certain that . . . Saltzer referrals to St. Luke's will increase.") *St. Luke's*, 2014 WL 407446, at *13.

Private Hospital Claims Relating To Referrals

Similar claims may be available to other hospitals who believe that they will be significantly harmed by a competitor's acquisition of a key physician group. Such claims are likely to be most effective where the acquiring hospital is dominant in its local market and the group to be acquired has played an important role in supporting the aggrieved hospital. Under these circumstances, the aggrieved hospital may lose critical referrals, and, perhaps, critical participants in its provider network. When those losses are to a dominant rival, this can constitute harm to overall competition in a relevant market, a key requirement under the antitrust laws. "[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 279 (1964); *see also Phila. Nat'l Bank*, 374 U.S. 321, 365 n.42 (1963).

[1] Richard M. Scheffler, *et al.*, *A New Vision for California's Healthcare System: Integrated Care with Aligned Financial Incentives*, BERKELEY HEALTHCARE FORUM, at 38 (Feb. 2013), *available at* http://berkeleyhealthcareforum.berkeley.edu/wp-content/uploads/A-New-Vision-for-California%E2%80%99s-Healthcare-System.pdf.

Such a claim can also be significant if the hospital acquiring the physicians has a history of high prices, and the hospitals who will be harmed are lower priced (and perhaps higher quality) competitors. *See United States v. H & R Block*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011) (noting that proposed "merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anticompetitive effects.") (quotation marks omitted). In *St. Luke's*, Treasure Valley Hospital, a physician owned surgical hospital which lost key referrals from St. Luke's physician acquisitions, had especially low prices. This harm to Treasure Valley diminished the importance of a lower priced competitive alternative.

Procedural Alternatives

Such claims can be raised in several different procedural contexts. They can be a basis for a private preliminary injunction action to stop a transaction before it is consummated; a private action seeking to break up a transaction shortly after it has closed; a private lawsuit for damages; or, potentially, a complaint to antitrust enforcement officials about the transaction.

The standard for antitrust damages is quite lenient. The illegal action need only be a "contributing cause" to the harm. *See, e.g., Prentice Mach. Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473, 479 (9th Cir. 1958) (noting that under the Clayton Act "a plaintiff may recover for loss to which a defendant's wrongful conduct substantially contributed, notwithstanding that other factors also contributed"). "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 47 S. Ct. 400, 405 (1927).

Damages from a shift in physician referrals can be quite substantial. Such damages would typically be measured by the lost incremental profit due to lost referrals. Given the substantial level of fixed costs in most hospitals, this can amount to 50% or more of lost revenues. These damages are trebled under the antitrust laws, and the prevailing party may recover its attorneys' fees. An aggrieved party need not necessarily wait until years after an acquisition in order to seek recovery. Future damages can also be recovered. See e.g. *Isaacson v. Jones,* 216 F.2d 599, 602 (9th Cir. 1954); *E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473, 479 (9th Cir. 1958); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811-12 (9th Cir. 1976). Past damages can be recovered within the four year antitrust statute of limitations.

Convincing antitrust enforcement officials to pursue these theories may be more difficult. The Director of the Federal Trade Commission's Bureau of Competition has stated that "[w]hile we are attentive to the possibility of a transaction leading to vertical foreclosure, we have not yet challenged a purely vertical merger involving a hospital and a physician practice."[2] FTC Bureau of Competition Director Feinstein also stated that "antitrust challenges by the federal antitrust agencies based on vertical theories of harm are rare. That said, a vertical provider transaction could raise concerns, e.g., if a hospital acquired so many physicians in a particular specialty that a competing hospital would be unable to provide that service because it lacks access to the needed physicians."[3] This is a more demanding standard than is required by the case law.

The National Association of Attorneys General has a history of greater interest in vertical antitrust claims than the federal agencies. *See* Trade Regulation Reporter (CCH) ¶ 13,400

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[2] Deborah Feinstein, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, at 8 (June 19, 2015), *available at* http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

[3] *Id.*

(1995). However, many state enforcement officials may not have the resources to bring a complex antitrust claim without the participation of the FTC.

Nevertheless, other avenues for relief may exist for a hospital that does not wish to pursue a private action. If these vertical claims are raised by a transaction which will also cause reduced "horizontal" competition between the acquiring hospital's own physicians and the physicians in the group to be acquired, that may provide a more traditional basis for governmental enforcement action. We have recently successfully raised such "horizontal" issues with an antitrust agency on behalf of a hospital client, where that client's own interests were most affected, not by the "horizontal" issue, but by the prospective loss of referrals from the physicians to be acquired. The agency's questions to us addressed the full range of horizontal and vertical issues. Ultimately, the transaction was abandoned by the parties due to (they reported) the agency's serious concerns.