# PUBLICATION

## FTC Defeats Another Hospital Merger [Ober|Kaler]

**2014**

The Federal Trade Commission's (FTC) recent streak of successfully challenging hospital mergers under section 7 of the Clayton Act (15 U.S.C. § 18) continues. On April 22, 2014, the United States Court of Appeals for the Sixth Circuit denied a petition filed by ProMedica Health System, Inc. (ProMedica) challenging the FTC's final Order requiring ProMedica to divest itself of St. Luke's Hospital (St. Luke's). *ProMedica Health System, Inc. v. Federal Trade Commission*, 2014 WL 1584835 (6th Cir. April 22, 2014).

ProMedica and St. Luke's are two of four hospitals located in Lucas County, Ohio. According to the court's opinion, ProMedica is the largest and “most dominant” provider in Lucas County with a 46.8 percent share of the general acute care cluster market (GAC). St. Luke's, on the other hand, is the smallest hospital provider in Lucas County with a GAC market share of approximately 11.5 percent. St. Luke's offers only primary and secondary care services, and does not have an obstetrics department. The other two hospital providers in Lucas County are Mercy Health Partners with a 28.7 percent market share, and the University Of Toledo Medical Center with 13 percent share.

The parties agreed to, and the court accepted, a geographic market for antitrust purposes that was limited to Lucas County. However, the appropriate definition of the relevant product market was disputed, with ProMedica arguing that the FTC erred by limiting the cluster market to primary and secondary services. The court discussed the appropriate framework for analyzing and defining the relevant product market, using the Horizontal Merger Guidelines (Merger Guidelines) as guidance (after pointing out that they were not binding on the court). After which, the court concluded that the FTC had conducted the appropriate analysis and produced sufficient evidence to support a finding of two separate relevant product markets, one consisting of a GAC limited to primary and secondary services, and a second limited to just obstetrics services. The court's decision was aided by ProMedica's concession, made in its pleadings, agreeing that tertiary services were not in the relevant market. The court went on to accept the FTC's evidence demonstrating that a merged entity would garner a 60 percent share of the GAC market, and an even larger 80 percent share of the obstetrics market.

In addition, and despite acknowledging that the tool used by the FTC to measure market concentration (i.e., the Herfindahl-Hirschman Index (HHI)) was perhaps not appropriate in a case limited to a unilateral effects analysis (anticompetitive effects due to the elimination of competition between the merging entities), the court nevertheless refused to ignore what it described as exceptionally high HHI numbers that, under the Merger Guidelines, created a rebuttable presumption of illegality. The court noted the strong correlation between market share and the ability to raise prices, and indicated that ProMedica's high market share in what was already a concentrated market would grow after the merger and at some point the FTC was entitled to put significant weight in the market concentration data.

Additional evidence presented by the FTC convinced the court that the FTC correctly found that the merger would adversely affect competition in violation of section 7. The court looked at, among other things, historical evidence from managed care organizations (MCO), and e-mails from the parties themselves, identifying each other as their closest competitors. MCOs testified that they could not successfully market a plan that did not include at least one of the merging parties, but had successfully marketed plans that included only one rather than both of the parties. ProMedica also provided discounts (albeit small) to MCOs that excluded St. Luke's, and internal e-mails from St. Luke's management (namely its turnaround specialist) noted that ProMedica was

its “most significant competitor,” and indicated that a merger with ProMedica “ha[s] the greatest potential for higher hospital rates … [and] a lot of negotiating clout.”

Finally, the court concluded that ProMedica made little effort to rebut the presumption of illegality. For starters, ProMedica made no effort to show that the transaction would benefit consumers (through efficiencies or otherwise) rather than just benefit the parties. Apparently, quality considerations were not a driving factor as St. Luke's quality actually exceeded ProMedica's. The court also stated that ProMedica's “weakened competitor” defense based on St. Luke's dire financial straits (in an effort to show that St. Luke's offered no real competitive constraint to ProMedica) was easily rejected due to the fact that St. Luke's market share had actually been increasing prior to the merger.

The *ProMedica* decision further highlights a number of continuing themes that seem to undermine difficult hospital transactions. First, in-depth and early consideration should be given to the consumer benefits expected from the transaction. As noted by the court, the greater the potential for anticompetitive harm, the greater must be the offsetting consumer benefits. Second, create an action plan, early in the transaction process, for reaching out to relevant third parties (primarily MCOs) and community members to garner support for the transaction. And, finally, train employees (particularly those involved in strategic planning, negotiating, and marketing) how not to crater a transaction before it starts by understanding what should and should not appear in print.