

## CLIENT ALERT

### FTC Wins Review of Divestiture Order in Hospital Merger Case

April 23, 2014

In the latest in a string of successful hospital merger challenges, the United States Court of Appeals for the Sixth Circuit recently denied ProMedica's petition for review of the FTC order requiring it to divest St. Luke's hospital.

In August 2010, ProMedica—the largest hospital provider in Lucas County, Ohio—merged with St. Luke's, an independent community hospital. The FTC challenged the merger in January 2011 and obtained an injunction from the district court that barred ProMedica from terminating St. Luke's contracts with managed care organizations (MCOs), eliminating or transferring St. Luke's clinical services, or terminating St. Luke's employees without cause while the FTC investigated the transaction. After extensive hearings, an Administrative Law Judge and later the Federal Trade Commission itself determined that the merger would adversely affect competition in violation of Section 7 of the Clayton Act.

The Sixth Circuit found that the FTC's analysis was comprehensive, carefully reasoned, and supported by substantial evidence, particularly in both areas challenged by ProMedica. Specifically, the court agreed with the FTC practice of clustering hospital services (e.g., various primary or secondary care services, when competitive conditions were similar for each) was an appropriate method of defining the relevant market. The court similarly found that the FTC's reliance on the Herfindahl-Hirschman Index was appropriate, given the strong correlation between market share concentration and pricing. Both the FTC and the court focused on the fact that ProMedica and St. Luke's were the dominant providers in southwest Lucas County and thus were substitutes for managed care organizations in that area.

The merging parties' own statements, which confirmed the FTC's presumption of illegality rather than rebutted it, may have been fatal to their appeal. For example, the Court quoted St. Luke's CEO as stating that the merger is the best path to higher hospital rates and would give the combined entity negotiating clout with insurers—a statement at odds with ProMedica's argument that its range of services, not its market share, allowed it to negotiate higher reimbursement rates. The Court also found that ProMedica failed to provide evidence of efficiencies sufficient to rebut the presumption of anticompetitive effects.

Please [click here for a copy of the court's decision](#). ProMedica has stated that it will appeal the Sixth Circuit's ruling.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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