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FTC Prevails in Physician Merger Case Before the 8th Circuit

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The 8th Circuit Court of Appeals recently handed the Federal Trade Commission (FTC) another appellate victory in its efforts to curtail anticompetitive mergers in the healthcare industry, affirming the FTC's earlier District Court victory in *Federal Trade Commission v. Sanford Health*. The decision follows a number of other recent FTC appellate victories in healthcare merger cases – in the Third, Seventh and Ninth Circuits – over the last several years.

In the *Sanford Health* case, the FTC (joined by the State of North Dakota), alleged that Sanford Health's proposed acquisition of a large multi-specialty physician group in Bismarck, North Dakota – Mid Dakota Clinic, P.C. – would have anticompetitive effects. In support of the claim, the FTC alleged that, post-merger, Sanford Health would have a 99.8% market share in the general surgeon services market in the Bismarck-Mandan region, a 98.6% share in pediatric services, an 85.7% share with respect to adult primary care services; and an 84.6% share of the OB/GYN physician services market. Each of these market shares, and the increase in these shares caused by the proposed merger, create presumptions under the FTC/DOJ Horizontal Merger Guidelines that the proposed transaction would have anticompetitive effects.

In response to the FTC's claims, and in defense of the merger, Sanford Health advanced four main

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arguments: (1) that market concentration has no relationship to bargaining power in North Dakota (principally because Blue Cross of North Dakota is a "dominant" payor in the state, and can resist any proposed price increase by providers); (2) that Catholic Health – the only other provider of physician services in the region – was poised to expand its services after the merger, ensuring future competition and a subsequent lessening of Sanford Health's market share; (3) that efficiencies from the merger offset any potential harm to consumers; and (4) that Mid Dakota's weakened financial condition justified the merger. However, the 8th Circuit rejected each of these arguments.

First, as to the argument that, due to Blue Cross of North Dakota's size, it could repel any potential price increase from Sanford Health post-merger, the Court noted that a Blue Cross representative had testified at trial that Sanford would, in fact, be able to force Blue Cross either to pay higher reimbursement rates post-merger or be forced to leave the Bismarck-Mandan region (given the need to offer the physician services largely offered only by Sanford to its insureds). In addition, as to Catholic Health, the Court noted that, under the Horizontal Merger Guidelines, new entry must be "timely, likely and sufficient in magnitude, character and scope to deter or counteract the competitive effects of concern," and conclude – as the lower court had – that Catholic Health's entry, even were it to occur, would not be timely enough to eliminate potential anticompetitive harm. Third, the Court held that the efficiencies that Sanford Health claimed would be created were, for the most part, not "merger specific" – another requirement under the Horizontal Merger Guidelines – and thus could not counterbalance the FTC's claimed anticompetitive effects. And finally, as to the claim that the merger was necessary due to Mid Dakota's failing financial health, the Court noted that evidence in the case suggested that Mid Dakota physicians enjoyed compensation levels 32% above the national average, and that the minutes of a Mid Dakota shareholders meeting at which the proposed

merger was discussed indicated that the motivation for the merger was to sell at a high share value, not concern about the long term viability of Mid Dakota. Accordingly, for all of these reasons, the 8th Circuit affirmed the lower court's decision to enjoin the merger.

As noted above, the 8th Circuit's ruling continues a recent "winning streak" for the FTC in healthcare merger appeals in various circuits. In addition, the decision also demonstrates the FTC's continued interest in the competitive implications of physician group mergers (which seems to have increased since the FTC's successful challenge to a physician group transaction in 2015 – the *St. Luke's Health System* case), and the increasing willingness of the federal courts to rely upon the FTC/DOJ Horizontal Merger Guidelines for support for decisions to find that proposed mergers violate the antitrust laws. This last development is significant, given that the Horizontal Merger Guidelines are merely a statement of FTC/DOJ policy in the merger area, and not a binding upon any court. However, as the *Sanford Health* case demonstrates, the Guidelines are increasingly being used by the Courts as a basis for their decisions in merger cases. Where this may ultimately lead remains to be seen; stay tuned.
