The ProMedica decision: Illustrating the anti-competitive behavior outlined in the horizontal-merger guidelines

By: Erika L. Gustafson, Esq., and Tera Bias
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There is speculation that the 6th U.S. Circuit Court of Appeals' ruling in ProMedica Health *System v. Federal Trade Commission*, No. 12-3583, 2014 WL 1584835 (6th Cir. Apr. 22, 2014), will have a substantial impact on the future of health care merger cases. Although the 6th Circuit's opinion may not be broad enough to disrupt common practice in the health care industry, the decision could have a significant effect on how merging companies evaluate, analyze and plan for a merger that may attract the scrutiny of the FTC.

Antitrust litigation, however, is inherently fact-dependent. In this case in particular, the wealth of evidence suggesting the underlying anti-competitive motivations for the merger between ProMedica Health System and St. Luke's Hospital is likely to make this decision distinguishable from future cases.1

ProMedica and St. Luke's both had internal documents that demonstrated the companies' motivations behind a proposed merger. The motivations nearly paralleled the type of behavior the FTC and U.S. Department of Justice identified as evidence of anti-competitive behavior in their August 2010 horizontal-merger guidelines.2

The courts reviewing the factual issues and evidence in *ProMedica* analyzed the parties' statements, actions and actual market behavior in connection with many of the suggested anti-competitive behaviors outlined in the guidelines.

The 6thCircuit ultimately agreed with the FTC's decision that the merger violated the Clayton Act. As the court aptly stated in its opinion, "the commission's best witnesses were the merging parties themselves."3 ProMedica and St. Luke's were substantial competitors in the relevant market for a number of years before merger discussions led to an FTC investigation and a lawsuit.
The evidence presented in the case demonstrated that ProMedica had, for several years, engaged in aggressive competitive practices with St. Luke's. St. Luke's believed the conduct was intended either to "take over St. Luke's or put us out of business."4

ProMedica's aggressive strategies, enabled by its dominance in the relevant market, apparently became so disruptive to St. Luke's that in 2007 St. Luke's considered filing an antitrust suit against ProMedica. After years of tolerating ProMedica's strategies and losing business, St. Luke's adopted an "if you can't beat them, join them" strategy in 2009. In advocating a potential merger with ProMedica, St. Luke's recognized that, even if "it may not be the best thing for the community in the long run," the merger would enable St. Luke's to capitalize on ProMedica's pricing power.

The combined entity would allow both parties to raise hospital rates and could help St. Luke's continue to "stick it to employers, that is, to continue forcing high rates on employers and insurance companies."5

Although every business can be expected to pursue increased revenues and compete aggressively for market share after a merger, what stands out in this case is that both ProMedica and St. Luke's anticipated and prepared for an FTC investigation of their potential merger.

The FTC investigation found internal documents and evidence from both companies that demonstrated motivations for the merger that nearly paralleled the commission's description of anti-competitive behavior in the horizontal-merger guidelines. Many of the same evidentiary factors outlined in the guidelines formed the basis of the appeal panel's analysis: market power and concentration, post-merger price increases, post-merger lack of meaningful competition, and lack of efficiencies that offset the anti-competitive aspects of the merger.

The wealth of evidence suggesting the underlying anti-competitive motivations for the merger between ProMedica Health System and St. Luke's Hospital is likely to make this decision distinguishable from future cases.

With substantial anti-competitive evidence in hand, the FTC was able to present a well-grounded case for violation of the Clayton Act.
Without meaningful rebuttal evidence from either defendant, the appeals court could not reasonably decide otherwise.

Section 7 of the Clayton Act is designed to prevent mergers that would significantly increase market concentration and power, having the effect of substantially lessening competition.6

As the court aptly stated in its opinion, "the commission's best witnesses were the merging parties themselves."

The appeals court and trial court determined that the merger was presumptively illegal based on the heavy concentration and market share in the relevant market post-merger.

After the merger, ProMedica had a market share above 50 percent for primary and secondary services, and above 80 percent in obstetrical services. The increase in market concentration was more than five times and more than three times the respective thresholds for creating a presumption of anti-competitive effects.7

The courts analyzed evidence of ProMedica's market power and market concentration post-merger along with evidence of the intended post-merger price increases and lack of meaningful competition.8

According to the guidelines, market power is the power of "one or more firms to raise price, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives."9

The 6th Circuit found a strong correlation between ProMedica's market share and its ability to impose high prices on the relevant market.10

The evidence did not merely suggest that ProMedica and St. Luke's *could* unilaterally impose higher prices on consumers and insurers post-merger, but that the parties considered this as a natural consequence and benefit of the merger.
The defendants were aware that the FTC and the courts would view these price increases negatively. The parties therefore spent significant time and money pre-merger planning for an antitrust review of the merger by the FTC.11

Before the merger, there were only four hospitals in the county that served the target market. Even with that competition, ProMedica largely dominated this market and was able to charge among the highest rates in the state, as well as offer discounts on reimbursement rates to insurers to exclude St. Luke's from their patient networks.12

Post-merger, consumers had only two options for primary and secondary services, and only one for obstetrical services. ProMedica had the capacity to control consumer's choices in provider networks for the relevant market.13

The 6th Circuit held that the strong correlation between market share and price fully supported the FTC's presumption of illegality.14

The court found that the degree to which the merger would further concentrate the relevant market and enhance ProMedica's market power "to levels rarely tolerated in antitrust law" supported this judgment.

Facing the strong presumption of anti-competitive activity in violation of the Clayton Act, the burden shifted to ProMedica to rebut that belief with evidence of efficiencies, or enhancements to community welfare, that would offset the anti-competitive effects.

The higher the presumption of anti-competitive activity presented, the higher the burden is on a defendant to demonstrate that the benefits to the community in the relevant market outweigh the proposed merger's anti-competitive effects.

The courts determined that ProMedica's evidence of efficiencies were speculative and lacking at best, and counterweighted by the parties' own acknowledgements that the merger would harm the community.15

The guidelines provide that one of the primary benefits of a merger is to "generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced services, or new products."16

The evidence produced in this case, however, suggested that the merger would result in higher prices and decreased quality of care and service levels.17

There was an overwhelming amount of testimony and evidence that the courts and the FTC produced in coming to a decision that the merger was anti-competitive.

It is difficult to imagine with the wealth of evidence mounted against the defendants how they could have presented evidence of efficiencies sufficient to convince the court that the FTC's decision was in error.

The 6th Circuit found the FTC's analysis of the merger to be "comprehensive, carefully reasoned, and supported by substantial evidence in the record."18

That view is also supported by the lengthy analysis of the record provided by the lower court in granting a preliminary injunction at the outset of the FTC's investigation.

The appeals panel further noted the lengthy written decision of the administrative law judge in the case in December 2011, following an administrative hearing lasting over 30 days and producing more than 8,000 pages of trial testimony and over 2,600 exhibits. 19

In short, the decision in favor of the FTC was not an easy one. The parties were afforded a significant amount of analysis by the courts in reaching their decision.

With substantial anti-competitive evidence in hand, the FTC was able to present a well-grounded case for violation of the Clayton Act.

It is difficult, in light of the evidence that the FTC had to rely on in this case, to presume that the *ProMedica* decision will significantly alter the course of antitrust regulation and/or future horizontal-merger cases.

This is particularly true given that the evidence of the parties' market behavior in *ProMedica* seemed to virtually track what the FTC has clearly discussed as evidence of anti-competitive behavior in the guidelines.

The decision, and the guidelines, should be considered carefully by market players going forward, particularly hospital systems battling for increased market share and revenues in smaller markets. It should be a guide to exactly what type of market behavior and decision-making with respect to competitors will be scrutinized and deemed anti-competitive by the FTC and the courts.