

St. Luke's Request for Rehearing Denied

UPDATE: April 21, 2015

The Ninth Circuit announced on April 21 that St. Luke's petition for panel rehearing and rehearing *en banc* were being denied after a vote of the judges. It remains to be seen whether the case will be appealed to the U.S. Supreme Court.

UPDATE, April 7, 2015

Late last month, St. Luke's and Saltzer filed a combined petition for panel rehearing and rehearing *en banc* with the Ninth Circuit. The providers took issue with the appellate court's handling of the efficiencies defense, geographic markets analysis, and what they call "the district court's novel 'leverage' theory." To support the petition, this week 17 law professors filed an *amicus* brief with the court.

Petition for Rehearing:

Efficiencies Defense:

First, St. Luke's and Saltzer argue in this petition that the providers' offered a valid efficiencies defense of the proposed merger, including an explanation of how integrated care can improve quality and lower costs (as an alternative to a fee-for-service model). The parties' argue that efficiencies are a valid reason to allow a merger under the law of several circuit, and are even included in the FTC's own Horizontal Merger Guidelines as factors that may rebut a *prima facie* case under the Clayton Act.

Geographic Markets:

Second, the providers argued that panel decision conflicts with precedent in the methodology it used to determine the

relevant geographic market in the case. The providers argue that the court's error was in focusing on insurer and consumer preferences, as opposed to on consumers' practicable alternatives.

"Leverage" Theory:

Last, the providers took issue with the panel's application of the plaintiffs' theory that the transaction was illegal because it would enhance the merged entities' "bargaining leverage." This point is focused on an internal inconsistency identified by the providers, which they claim resulted in the Ninth Circuit inadvertently recognizing this novel leverage theory.

Amicus Brief:

The *amici* are identified as professors and scholars of law and economics located throughout the country and the International Center for Law and Economics. This brief focuses on the efficiencies defense. Procedurally, the law professors take issue with the court's treatment of this defense as a component of an antitrust case. Substantively, the professors explain the efficiencies to be gained through integrated healthcare.

The amicus brief was filed along with a motion for leave to file it. So far, the court has not ruled on the motion to file the amicus brief or the petition for rehearing.

The Ninth Circuit (Panel) Decision:

On Tuesday, the Ninth Circuit affirmed the district court's block of the Idaho provider merger at issue in *Saint Alphonsus Medical Center, et al v. St. Luke's Health System, LTD, et al*. For background on the case and a link to video of the parties' appellate arguments, see our November [blog post](#).

The appeals court found no clear error in any of the lower

court's findings. In particular, the panel affirmed the district court's application of the hypothetical monopolist test to arrive at Nampa as the relevant geographic market. Notably, in discussing the geographic market analysis, the panel pointed out that defining geographic markets in healthcare cases presents a unique challenge due to the involvement of health plans, which act as both buyers and sellers. The appeals court did express concerns that the district court's finding that, were the merger to go through, St. Luke's would use its newfound bargaining power to raise prices in the hospital-based ancillary services market, was unsupported by the record. Notwithstanding that concern, the panel found no clear error in the lower court's findings.

The appellate court also addressed St. Luke's efficiencies defense, i.e., that the merger's precompetitive effects achieved through integrated care and risk-based reimbursement meant it passed Clayton Act muster. The panel noted that the U.S. Supreme Court had not recognized that defense, and though other several circuits have, the Ninth Circuit remains skeptical. In any event, the appeals court agreed with the district court that although some efficiencies might be gained through the merger, those efficiencies were insufficient to rebut the FTC's prima facie case of illegality under the Clayton Act. Lastly, the panel affirmed the district court's remedy of divestiture.

This case represents an important win for the FTC. The enforcement agency appears to be on a winning streak against hospital mergers. With a seemingly endless stream of deals, it will be interesting to see where the next merger case is filed.

The full opinion is available [here](#).