4 Economic Takeaways From 6th Circ. ProMedica Decision

By **Loren Smith and Josephine Duh** (November 9, 2021)

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Contracts between health care providers — e.g., hospitals and physicians — and health insurance carriers are a key factor in the cost of health care in the U.S.

Pricing for services provided to privately insured individuals is determined in part through the negotiations between health care providers and private health insurers, and it is increasingly common for provider networks to influence pricing for services provided to publicly insured individuals, such as enrollees in Medicaid managed care plans and Medicare Advantage.

Hence, it is not surprising that contract negotiations have become a central focus regarding antitrust assessment of health care provider and insurance carrier conduct.

Take, for example, the Aug. 10 decision in St. Luke's Hospital v. ProMedica Health System Inc.

St. Luke's and ProMedica are two of four hospital systems in Lucas County, Ohio. In 2010, ProMedica sought to merge with St. Luke's.

In 2012, The Federal Trade Commission, citing the likely anti-competitive effects of such a merger, objected and ordered ProMedica to divest St. Luke's.[1] In 2014, ProMedica lost its appeal in the U.S. Court of Appeals for the Sixth Circuit. The FTC approved the divestiture agreement in 2016.[2]

As part of the agreement, Paramount — ProMedica's health insurance arm — would include St. Luke's Hospital as an in-network provider unless ownership of St. Luke's changed, in which case "Paramount could 'immediately terminate' its contracts with [St. Luke's] and its physician group."[3]

In October 2020, McLaren Health System, a vertically integrated health system with the 10th largest insurance operation owned by a health care system or provider in 2019,[4] agreed to acquire St. Luke's, which was renamed as McLaren St. Luke's.[5]

Soon after, ProMedica exercised its option to no longer include St. Luke's as an in-network provider in its Paramount health plans — apart from its Medicaid plans — and terminated its contractual agreements with the hospital.[6]

On Nov. 10, 2020, St. Luke's sued ProMedica for alleged monopolization of and attempt to monopolize the relevant markets, including general acute care hospital markets.[7]

On Dec. 29, 2020, the U.S. District Court for the Northern District of Ohio granted St. Luke's a motion for preliminary injunction that prevented ProMedica from ending its provider contracts with St. Luke's, effective Jan.1 of this year.[8]

However, the Sixth Circuit reversed the district court's decision on Aug. 10.[9]

St. Luke's v. ProMedica highlights important economic concepts to consider when analyzing anti-competitive harm with vertically integrated companies — e.g., vertically integrated health systems, which are health care entities that operate in multiple distinct parts of the health care system such as entities that own both a hospital and health insurer. It also highlights considerations for analyzing an evolving marketplace. Both of these elements are becoming increasingly common in the U.S. health care industry.[10]

This article focuses on four economic concepts that were evident in St. Luke's v. ProMedica that may apply more broadly to other cases:

1. For a firm to leverage market power in one market to gain or maintain market power in another market, it generally is compulsory that the accused firm has market power in the market from which the alleged ability to leverage derives.

2. For a vertically integrated company, the alleged conduct likely affects multiple business segments, which would be missed with a narrow assessment of just one segment.

3. In a dynamic industry such as health care, an evolving competitive environment may affect the incentives of the market participants and bargaining processes.

4. The economic incentives that govern a firm's management of contractual relationships with its business partners include procompetitive protections of investments — particularly when those business partners also are competitors — which the firms themselves are often in the best position to understand.

First, a threshold issue in a monopolization case is whether the defendant has market power in the relevant market, or markets, that is sufficient to cause anti-competitive harm.

In St. Luke's v. ProMedica, the plaintiffs claimed that the exclusion of St. Luke's from Paramount's provider networks enables ProMedica to allegedly monopolize the general acute care hospital market.

For such a mechanism to work, ProMedica and Paramount must have market power in the market for private health insurance plans that is significant enough to harm competition in the general acute care hospital market.

Assessing ProMedica and Paramount's market power in health insurance markets would require a separate inquiry into the players, market shares, pricing, and products offered in the market for private health insurance plans.

Simply pointing out that ProMedica provides a large share of general acute care hospital services in certain geographies would only provide a partial view of the facts behind the plaintiffs' allegations. As shown in this case, it can be important to analyze all of the relevant markets.

A second economic issue is whether the defendant's actions have "valid business reasons."[11] For some vertically integrated entities, an investigation into business justifications requires an assessment across business segments rather than narrowly focusing on one segment.

Taking ProMedica as an example, it was important to consider how the new relationship

between St. Luke's and McLaren potentially altered the benefits of the relationship between St. Luke's and ProMedica.

Prior to McLaren's acquisition of St. Luke's, the inclusion of St. Luke's in Paramount's provider networks benefited ProMedica in part because "more advanced-care patients" at St. Luke's would seek care at ProMedica.[12]

After McLaren acquired St. Luke's, ProMedica anticipated that those benefits would be reduced because some proportion of those patients would seek advanced care, such as cancer treatment, at McLaren facilities.[13]

From ProMedica's perspective, to get a complete view of its agreement with St. Luke's, premium revenues and enrollment in Paramount's health plans must be considered alongside reimbursement and patient flow at ProMedica's health facilities. An isolated look at one segment may, again, only provide an incomplete view of the economically relevant facts.

Third, and more generally, in a dynamic industry such as health care, the analysis of alleged conduct — or damages — should consider how shifts in the environment affect the incentives and bargaining positions of the market players.

Examples of shifts may include:

- Payment changes, e.g., revisions to Medicare reimbursement rates;
- Regulatory changes that affect service provisions, e.g., rules and requirements concerning telehealth; and
- New entrants or new capabilities of existing players.

In St. Luke's v. ProMedica, the termination of ProMedica's contracts with St. Luke's precipitated after McLaren's acquisition of the hospital.

Like ProMedica, McLaren is a vertically integrated health system that can and does provide advanced medical care and has a health insurance arm.

Hence, McLaren is a potential competitor to ProMedica in both the provision of health care services and as a health plan. Thus, even if ProMedica's arrangements with St. Luke's prior to McLaren's acquisition were profitable, the change in the competitive environment alters the incentives of the parties and possibly the optimal provider networks for Paramount's health plans.

In the words of U.S. Circuit Judge Jeffrey Sutton in the court's opinion: "In a competitive market, businesses that do not tack when economic winds change are doomed to fail. The antitrust laws promote competition, not sclerosis."[14]

The fourth and final economic issue is that, because companies' management of their contractual arrangements often are necessary to preserve competition, courts are wary about intervening in the ways in which "individuals and companies may do business."[15]

For example, when anti-competitive harm has not been proven, externally imposed constraints on business practices may reduce procompetitive incentives to invest on the part

of the defendant as well as the plaintiff.

For the defendant, the imposed constraint may reduce the expected gains; for the plaintiff, the imposed constraint may give an opportunity for "free riding" in which it can benefit from the investment without sharing in the full costs.

In St. Luke's, there are at least two ways in which forcing ProMedica to keep St. Luke's in Paramount's provider networks could reduce procompetitive investments.

First, McLaren may have less incentive to introduce its own health plans in Lucas County, which would offer consumers more plan options.

Second, ProMedica may have less incentive to invest in improved services to compete with McLaren because patients are more likely to be siphoned to McLaren facilities.

Indeed, the Sixth Circuit recognized that "[f]orcing ProMedica to continue dealing with St. Luke's may even lessen incentives to compete—that's what happens with some antitrust conspiracies — an outcome antithetical to a central aim of antitrust law."[16]

As the health care industry continues to shift and vertically integrated entities increase in prevalence and prominence, St. Luke's provides a case study highlighting economic questions to consider when assessing alleged monopolization, particularly through provider network formation.

The concepts of market power that can enable anti-competitive conduct, valid business reasons, changing competitive circumstances and pro-competitive incentives to invest are not new to antitrust analysis. Rather, as exemplified in St. Luke's v. ProMedica, these concepts may require new ways of assessing the evidence as the industry evolves.

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[1] "Citing Likely Anticompetitive Effects, FTC Requires ProMedica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area," Federal Trade Commission (March 28, 2012), available at https://www.ftc.gov/news-events/press-releases/2012/03/citing-likely-anticompetitive-effects-ftc-requires-promedica.

[2] "Federal Appeals Court Upholds FTC Order Finding Ohio Hospital Acquisition Was Anticompetitive," Federal Trade Commission (April 22, 2014), available at https://www.ftc.gov/news-events/press-releases/2014/04/federal-appeals-court-upholds-ftc-order-finding-ohio-hospital; "FTC Approves ProMedica Health System's Divestiture of former Rival St. Luke's Hospital," Federal Trade Commission (June 24, 2016), available at https://www.ftc.gov/news-events/press-releases/2016/06/ftc-approves-promedica-health-systems-divestiture-former-rival-st.

[3] St. Luke's Hosp. v. ProMedica Health Sys., No. 21-3007, 8 F.4th 479, 485 (6th Cir. Aug.

10, 2021).

[4] "Largest healthcare system- or provider-owned insurance operations," By the Numbers: Resource Guide 2020-2021, MODERN HEALTHCARE (Dec. 14, 2020), at 25.

[5] As a shorthand, the article will continue to refer to the hospital as "St. Luke's."

[6] St. Luke's Hospital d/b/a McLaren St. Luke's, WellCare Physicians Group, LLC v. ProMedica Health System, Inc., et al., 3:20-cv-02533-JZ, Dkt. No. 1, ¶ 3 (N.D. Ohio 2020).

[7] Id. at ¶¶ 24, 188-195. In addition to its allegations regarding Section 2 of the Sherman Act, St. Luke's alleged that ProMedica violated Section 1 of the Sherman Act in its "[e]nforcement of the change in control clause" (Id. at ¶¶ 183-187).

[8] St. Luke's Hosp. v. ProMedica Health Sys., 510 F. Supp. 3d 529, 538 (N.D. Ohio 2020).

[9] St. Luke's Hosp. v. ProMedica Health Sys., No. 21-3007, 8 F.4th 479, 483 (6th Cir. Aug. 10, 2021).

[10] As examples, see Jeff Lagrasse, "DOJ investigating UnitedHealth's $13B acquisition of Change," Healthcare Finance News (March 30, 2021), available at https://www.healthcarefinancenews.com/news/doj-investigating-unitedhealths-13b-acquisition-change; Shelby Livingston, "Federal judge signs off on CVS-Aetna merger after post-deal review," Modern Healthcare (September 4, 2019), available at https://www.modernhealthcare.com/mergers-acquisitions/federal-judge-signs-cvs-aetna-merger-after-post-deal-review; and Bruce Japsen, "UnitedHealth Group Wins FTC Approval of DaVita Deal on Divestiture Conditions," Forbes (June 19, 2019), available at https://www.forbes.com/sites/brucejapsen/2019/06/19/unitedhealth-group-wins-ftc-approval-of-davita-deal/?sh=796beed66e40.

[11] St. Luke's Hosp. v. ProMedica Health Sys., No. 21-3007, 8 F.4th 479, 487 (6th Cir. Aug. 10, 2021), citing Aspen Skiing.

[12] Id. at *488. See also Id. at *485.

[13] Id. at *488.

[14] Id. at *489.

[15] Id. at *486.

[16] Id. at *492.