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Giving Weight to the Failing Firm Defense, FTC Consents to Physician-Services Merger with Caveats: Suspend Enforcement of Non-Competes and Make Departure Payments to Exiting Physicians Creating or Joining Competing Practices

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On October 5, 2016, the Federal Trade Commission (“FTC”) entered into a Consent Agreement with CentraCare Health (“CentraCare”) to settle competition concerns over CentraCare’s acquisition of St. Cloud Medical Group P.A. (“SCMG”), a competing physician services provider in St. Cloud, Minnesota. According to the FTC, the Consent Agreement is designed to mitigate the anticompetitive effects that would result from the acquisition, but “is premised on the fact that SCMG is a financially failing physician practice group that has been unable to find an alternative purchaser for the entire practice as well as concerns regarding disruptions to patient care and possible physician shortages.”¹

On February 29, 2016, CentraCare and SCMG, the two largest providers of various physician services in St. Cloud, Minnesota, entered into an acquisition agreement, under which CentraCare would acquire all outstanding shares of SCMG and directly employ all of SCMG’s physicians and advanced practice providers.

In a complaint filed on October 5, 2016, the FTC alleged that the acquisition would substantially increase CentraCare’s market share to over eighty percent in three specific physician service markets: adult primary care, pediatric primary care, and OB/GYN care. The FTC further alleged that, by eliminating SCMG as a potential alternative in the St. Cloud area, the acquisition was likely to increase CentraCare’s bargaining power vis-à-vis commercial health plans and allow CentraCare to increase reimbursement rates and to secure more favorable terms. As a result, the FTC alleged that the acquisition violated Section 7 of the Clayton Act because it was likely to substantially lessen competition for the provision of adult primary care, pediatric, and OB/GYN services in St. Cloud, Minnesota.

Critical to the FTC’s analysis was the credence it gave to the parties’ failing firm defense arguments. The FTC acknowledged that SCMG recently lost its sole remaining line of credit and appeared unlikely to be able to improve its financial condition. The FTC noted that physicians were leaving SCMG, and cited compelling evidence that more would depart both the group and the geographic area if the acquisition was not consummated. The FTC also acknowledged that SCMG made a good-faith, multiyear effort to find an alternative buyer for the entire medical group, but was unsuccessful. This was the first time that the FTC has given weight to the failing firm defense in a physician group merger.

To settle FTC’s concerns, CentraCare entered into a Consent Agreement (“Agreement”) with the FTC to mitigate the alleged anticompetitive effects of the merger. The Agreement permits the acquisition to proceed but requires CentraCare to suspend enforcement of any

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non-compete provisions against its physicians, so as to allow up to fourteen physicians to depart for other St. Cloud area practices. The Agreement also requires CentraCare to provide sizeable departure payments of \$100,000 each to the first five physicians leaving CentraCare to create new medical practices (or to join small third-party medical practices). This is the first time the FTC has imposed such incentive payments in a physician group merger.

The Agreement is now in a 30-day public comment period, after which the FTC will again review it and decide whether to withdraw from, modify, or make final the Agreement.

¹ ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT, *In the Matter of CentraCare Health System*, File No. 161-0096 (Oct. 5, 2016).

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