



# Health Law Section

## The Mississippi Bar

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Health Law Section  
The Mississippi Bar

## Message from the Chair

Wow! It is April already. Your Health Law Section has been busy trying to provide you with maximum benefit for your membership. We hope you have enjoyed the reinstatement of the newsletter and the newsfeed service through Lexology. In addition, please check out and like the Health Law Section Facebook page at <https://www.facebook.com/#!/mshealthlaw>

Summer is fast approaching, which means it is time to register for the Mississippi Bar's Annual Meeting and Summer School <http://www.msbar.org/for-members/annual-meeting.aspx> Part of the program will include a joint meeting of the Health Law Section and the Business Law Section on June 26 at 10 A.M. The MS De-

partment of Insurance, led by Insurance Commissioner Mike Chaney, will headline this meeting and provide us with the most up to date information on the implementation of the Affordable Care Act. Please make every effort to attend.

In addition, your Health Law Section is working diligently to provide you with another CLE opportunity in mid to late July. Stay tuned for further details.

I am humbled and honored to be your chair for 2013-2014. Please do not hesitate to offer your suggestions, complaints, and comments to me at [Stephen@clayfirm.com](mailto:Stephen@clayfirm.com). On behalf of your 2013-2014 Officers and Executive Committee, we thank you for your



Stephen Clay, Chair

membership to the Health Law Section. With your help this year, the Health Law Section was able to provide a \$750 scholarship to a most deserving law student at both Ole Miss and Mississippi College School of Law.

Thank you!  
Stephen Clay

## Court Finds Hospital Acquisition of Physician Practice Illegal

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### Introduction

The first litigated antitrust case concerning hospital acquisitions of physician practices, *Saint Alphonsus Health System, et al. v. St. Luke's, et al.*, has recently been decided. I represented one of the successful plaintiffs. The *St. Luke's* decision provides important lessons for any hospitals and physician groups considering significant mergers and acquisitions.

### Facts Underlying the St. Luke's Case

The *St. Luke's* case concerned an acquisition of a 41 physician practice in Nampa, Idaho (just outside of Boise) called Saltzer Medical Group. The buyer was St. Luke's Health System, the largest health system in Idaho, based in Boise. St. Luke's already employed several hundred physicians, and had engaged in more than 20 acquisitions of physician practices over the previous several years.

The Plaintiffs (including the Federal Trade Commission and Idaho Attorney General) contended that the acquisition would be unlawful because it would harm competition in the

adult primary care physician market in Nampa. The private plaintiffs, Saint Alphonsus and Treasure Valley, also claimed that the transaction would harm competition in the Nampa pediatricians market, as well as hospital and surgical facilities markets in the broader Boise area.

### The Court's Decision

The District Court held that the transaction was unlawful. Judge Winmill found that the acquisition of Saltzer was the latest in a series of acquisitions by St. Luke's that had already allowed St. Luke's to raise prices. He therefore predicted further price increases were likely as a result of the Saltzer acquisition.

The fact that this transaction involved primary care physicians was very significant to the Court's conclusions in several respects. The Court defined the geographic market as the local area of Nampa, and found that St. Luke's would have a high (80%) share in that area after the acquisition. The Court based its conclusion on geographic market on its finding that "[b]ecause Nampa patients strongly prefer access to local PCPs, commercial health plans need to include Nampa PCPs in their networks to offer a competitive product."

The Court also found it highly significant that "the Acquisition is not only a merger of the first

and second largest providers for primary care services, but is also a merger of each of those providers' closest substitutes." Under the Federal Trade Commission's analysis, when two competitors who are "close substitutes" merge, prices may rise.

The Court found that primary care physicians are critical to referrals of patients to specialists and hospitals. "Patients largely accept the recommendations of their primary care physicians as to what hospital, specialist and ancillary services they should use." The Court concluded that "after the Acquisition it is virtually certain that ... Saltzer referrals to St. Luke's will increase."

Ease of entry by new physicians into a market can often constitute an important antitrust defense in physician antitrust cases. The Court found that entry of substantial new competition in primary care in the Nampa area was unlikely, because recruitment of such physicians to that area is quite difficult.

Finally, and perhaps most significantly, the Court found that innovations in health care, intended to improve quality and reduce cost, do not require acquisitions. The Court stated that "it is the committed team [of hospitals and physicians] – and not any one specific organization structure – that is the key to integrated medicine ... because a

## Court Finds Hospital Acquisition of Physician Practice Illegal, *cont'd*

committed team can be assembled without employing physicians, a committed team is not a merger-specific efficiency of the Acquisition.” ¶¶ 184-185.

### Lessons from the Decision

Judge Winmill’s decision certainly provides encouragement to health care participants who believe that transactions in their local markets may be anticompetitive. It also provides very important lessons for providers seeking to conduct health care transactions. These include:

- There’s no simple “health care reform” defense where significant antitrust concerns are present. Judge Winmill found that the goals of health care reform can be achieved without acquisitions.
- Competitors, payors and employers can play very significant roles in the antitrust process. The key witnesses in the *St. Luke’s* case were several of the area payors (including Idaho Blue Cross) and the largest area employer, Micron. The lawsuit filed by Saint Alphonsus and Treasure Valley illustrates that in a hospital-physician transaction, competing hospitals which may stand to lose referrals or lose network access to the acquired physicians may also have substantial antitrust claims.
- A transaction resulting in a high market share will be presumed to be unlawful, and it will be difficult to present evidence which rebuts this presumption. If the merging parties possess a combined 50% share, this will exceed the level at which the FTC presumes transactions are anticompetitive.
- As in every antitrust case, the *St. Luke’s* decision turned in significant part on the merging parties’ own documents. Critical admissions in a memo or even an email can sink an antitrust defense.
- In hospital-physician transactions, it is important that physicians obtain their own expert antitrust counsel. If the transaction ultimately fails on antitrust grounds, the greatest loser may be the physician group, whose operations may have been “in limbo” during a long investigation and potentially litigation. Total reliance on the assurance of hospital counsel that antitrust issues will not be a concern can be a big mistake.

## Health Law Section Awards Scholarships to Law Students

The Health Law Section awarded two \$750 scholarships to two outstanding law school students at The University Of Mississippi School of Law and at Mississippi College School of Law.



Bradley Champine alongside  
Dean Richard Gershon



Majorie A. Horne and  
Dean Jim Rosenblatt

## Health Law Section

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We are on the  
web!  
Click [here](#)

### Upcoming Events

June 26, 2014  
Health Law Section Annual Meeting at the  
Sandestin Hilton

July 17, 2014  
6 hour CLE at the Mississippi Bar Center  
in Jackson. More details to follow!

### Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Jenny Tyler Baker at [Jenny@tindelllawfirm.com](mailto:Jenny@tindelllawfirm.com).

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting the Mississippi Bar the nonexclusive right to publish your article.

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