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February 27, 2015

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## Medical Monopoly Not A Game: Court Shoots Down Hospital-Medical Group Merger

Hospitals are acquiring physician practices at a blinding pace. They claim efficiency and better patient care is the underlying cause, which everyone, including themselves, knows is bullshit.

The physicians selling their practices are more ingenuous. They seek and receive cash from the sale.

Physicians coming from training and from private practice employment join hospital-owned practices seeking "safety," a fool's bet in any event, but it's what they believe.

Hospitals receive a tremendous economic benefit in owning a physician practice, not only because those physicians are now captive referrers generating facility fees, but also because Medicare payment rules provide tremendously higher reimbursement to hospital-owned physician practices than to independent ones. Of course, charges to consumers go up.

If the hospital can, both through practice acquisition and the expansion of its system, acquire sufficient market power, it can also pressure insurers, individual consumers, and others paying for healthcare to pay more for the same services.

It was just such a possibility of higher prices that led the federal courts to order the dismantling of a major medical group acquisition.

*The place:* Idaho.

*The players:* St. Luke's Health System, Saltzer Medical Group, several hospital competitors, the State of Idaho, and the Federal Trade Commission

*The preview:* Earlier this month, the 9th Circuit Court of Appeals upheld the 2014 trial court ruling that St. Luke's Health System violated federal antitrust laws when it acquired Saltzer. Specifically, the law at issue is §7 of the Clayton Act, which bars mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."

### Background

In 2012, St. Luke's acquired Saltzer, the largest independent multi-specialty physician group in the state. St. Luke's paid for Saltzer's assets and \$9 million for goodwill.

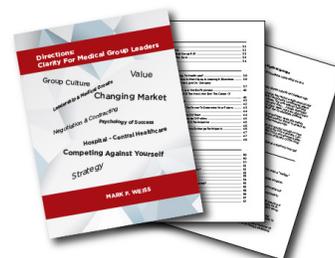
St. Luke's, a state-wide system, had an emergency clinic, but not a hospital, in Nampa, Idaho. Of the adult primary care physicians ("PCPs") in Nampa, St. Luke's employed 8, Saltzer employed 16, Saint Alphonsus, the only hospital in Nampa, employed 9, and there were several solo or small practices.

After the acquisition, St. Luke's had the largest number of PCPs in the Nampa market. Those physicians would refer into the St. Luke's system, although, for compliance reasons, the acquisition documents did not legally require it.

### Lawsuits and Decisions

The two hospital competitors, Saint Alphonsus and Treasure Valley (with a hospital in Boise and a surgery center in Nampa), and then the Federal Trade Commission, joined by the State of Idaho, filed independent suits. The suits were combined and focused on the

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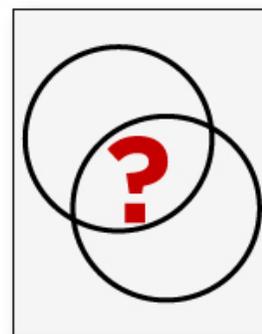
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acquisition's anticompetitive effects in the adult primary care provider market

In January, 2014, the District Court held that the acquisition was monopolistic and ordered it unwound.

St. Luke's appealed to the 9th Circuit Court of Appeals. In early February, the 9th Circuit upheld the lower court's decision including the remedy of requiring the divestiture of the Saltzer group.

As might be expected, the hospital argued that the purpose of the acquisition was to improve patient outcomes. Essentially, its position was that improvement in outcomes should trump the risk of anticompetitive price increases.

The trial court accepted as fact that St. Luke's and Saltzer genuinely intended to move toward a better health care system. The court also accepted that the merger would "improve patient outcomes" if left intact.

But despite the fact that the acquisition would improve care, the trial court found that the huge market share of the post-merger entity created a substantial risk of anticompetitive price increases.

The appeals court upheld the trial court in its entirety.

As of the date of publication, it's not known if St. Luke's will appeal the decision to the U.S. Supreme Court.

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#### Take Aways For Physicians

1. Despite the hopes by hospitals and large regional and national physician groups that coordination of care or better outcomes or other quality measures and efficiencies will excuse monopolistic activities, the 9th Circuit Court of Appeals, in upholding the trial court's decision, has made it clear that traditional antitrust analysis applies: if the acquisition combination creates market power that can hinder competition it should be enjoined.
2. We can expect to see more healthcare mergers and acquisitions, both those by hospitals and by large physician groups, challenged on antitrust grounds.
3. We can expect to see more non-merger business arrangements between hospitals and physician groups as hospital's seek to avoid antitrust scrutiny.

Contact me if you would like to discuss the applicability of these points, or the St. Luke's opinion, to your situation.

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## Wisdom. Applied. 74 - Flying First Class Medical Care

We'll begin boarding in a few minutes.

Although airlines have a lot to learn about customer service, they do serve as a model for pricing strategy in healthcare.

on December 30, 2014. Read or download [here](#).

Mark was quoted in the article **Top 5 financial challenges facing physicians in 2015**, published in the December 2014 issue of Medical Economics. Read or download [here](#).

Mark was quoted in the article **Top 15 challenges facing physicians in 2015**, published in the December 2014 issue of Medical Economics. Read or download [here](#).

Mark's article **Bundled Billing or Bungled Billing?** was published in the October 2014 issue of Pain Medicine News. Read or download [here](#).

Mark's article **What's Your Anesthesia Group Worth? And Why It Might Not Make Any Difference** was published in the Summer 2014 issue of Communique. Read or download [here](#).

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### Upcoming Presentations

**Date:** April 17, 2015

**Time:** 2:00 PM

**Topic:** From the Company Model to Joint Ventures to Just Sending Statements: Anesthesia Business and Deal Structure Compliance Traps

**Location:** [The Advanced Institute for Anesthesia Practice Management 2015](#), Las Vegas, Nevada

**Date:** April 17, 2015

**Time:** 3:20 PM

**Topic:** Is Your Anesthesia Group a Business or Club?

**Location:** [The Advanced Institute for Anesthesia Practice Management 2015](#), Las Vegas, Nevada

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## All Things Personal

Last weekend, I went to eat at a so-called “fast casual” restaurant, touted to serve healthy cuisine, Lyfe Kitchen. I’m still kicking myself that I didn’t pay significant heed to my first observation, that if they can’t spell why should I believe that they can cook? At least they are consistent.

The trend towards overpriced pseudo-health food in an upscale setting is instructive. Many entrants into the niche tout the same thing: Sustainable ingredients, healthy choices, trendy decor and so on, all designed to make you feel good about overpaying for mediocre fare while combating global warming... oops, I mean climate change.

But rather than be different, these places tend to be more of the same, all focused around what are apparently seen as the “best practices” for fast casual dining. The fact that they’ve all aimed for the same targets makes none of them distinct, all of them boring. Sure, they are prettier than your average McDonald’s, but that’s not saying much.

Instead, where’s the distinction? What crazy idea, that’s either bound to fail or bound to hit a home run but never to be seen as mediocre, is out there?

This is the same in most industries, from yours to mine. Maybe people think it’s safe, but it’s not. If there is no real difference between you and them, then you are easily replaceable.

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## Our Dallas Office is Moving

Our Dallas office will have a new address effective March 1, 2015:

The Mark F. Weiss Law Firm  
One Galleria Tower  
13355 Noel Rd., Suite 1700  
Dallas, TX 75240

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## Recently Published Blog Posts

Wednesday, February 18

Videocast: [The Cat’s Away. The Mice Did Play. Medical Group R.I.P.](#)

Monday, February 16

Blog Post: [Washington And Physicians: Who’s Bleeding Whom To Death?](#)

Thursday, February 12

Podcast: [Lead Because They Want To Be Led](#)

Wednesday, February 11

Blog Post: [Warranty As A Medical Practice Competitive Advantage](#)

Wednesday, February 11

Videocast: [The Chicken Or The Egg?](#)

Monday, February 9

Blog Post: [Do You Know What Costco Pharmacy Doesn't About The Lifetime Value Of A Customer?](#)

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Mark F. Weiss

The Mark F. Weiss Law Firm, a Professional Corporation  
(Formerly known as Advisory Law Group, a Professional Corporation)

[markweiss@advisorylawgroup.com](mailto:markweiss@advisorylawgroup.com)

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SANTA BARBARA OFFICE:

1227 De La Vina Street  
Santa Barbara, CA 93101

**Tel: 805 695 8107**

LOS ANGELES OFFICE:

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16th Floor  
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The Mark F. Weiss Law Firm 1227 De La Vina St. Santa Barbara, California 93101 United States (310) 843-2800

