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For more information,
contact:

Jeffrey S. Spigel
+1 202 626 2626
jspigel@kslaw.com

Norman A. Armstrong
+1 202 626 8979
narmstrong@kslaw.com

John D. Carroll
+1 202 626 2993
jdcarrroll@kslaw.com

Brian R. Meiners
+1 202 626 2910
bmeiners@kslaw.com

Albert Y. Kim
+1 202 626 2940
akim@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

FTC Wins Sanford Health/Mid Dakota Merger Appeal in Eighth Circuit

On June 13, 2019, the Eighth Circuit **affirmed** the district court's grant of a preliminary injunction blocking the proposed merger of North Dakota healthcare providers Sanford Health, Sanford Bismarck (collectively, "Sanford") and Mid Dakota Clinic, P.C. ("MDC"). The Federal Trade Commission and the North Dakota Attorney General filed the complaint for a preliminary injunction, which the district court granted on December 13, 2017, and the companies appealed.

Pursuant to a December 26, 2017 scheduling order, the administrative trial is stayed for 21 days following the ruling by the Court of Appeals. The companies will now have to decide whether to continue the battle in FTC administrative litigation or to abandon the transaction.

As discussed in more detail in prior client **alerts**, the district court noted that if the merger closed, the combined entity would control in the Bismarck-Mandan region nearly 100% of (i) general surgeon services and (ii) pediatric services and around 85% of (iii) adult primary care physician services and (iv) OB/GYN physician services.

On appeal, the 8th Circuit rejected the companies' argument that the district court had improperly shifted the burden of persuasion on the merging parties. The companies argued that the trial court had done so when it required them to produce evidence that "clearly shows" no anticompetitive effects were likely. The 8th Circuit concluded that the trial court had properly followed the *Baker Hughes* framework and placed the burden of persuasion on the FTC but that stronger rebuttal evidence from defendants was required when market shares approach monopoly.

With respect to the rebuttal evidence, the Court of Appeals found no "clear error" in the district court's conclusion that the evidence was insufficient to outweigh the FTC's showing of likely anticompetitive effects. In response to the companies' contention that it could not raise price on Blue Cross, the main payor in the region, as it was a "dominant buyer" with a statewide pricing schedule, the Court of Appeals pointed to



testimony from Blue Cross that (i) the combined firm would have power to raise prices and (ii) a near-monopoly provider in North Dakota had successfully forced Blue Cross to modify contractual terms in the past. The 8th Circuit went on to reject the companies' arguments with respect to timely entry by another competitor, merger-specific efficiencies and that Mid Dakota was a "weakened competitor."

The FTC's victory at the 8th Circuit continues the agency's winning streak in healthcare merger enforcement, and highlights that even relatively small value mergers may present antitrust risks if the merger would create a "must have" provider for payors. In addition, the FTC likely will emphasize the language in the decision regarding the need for stronger rebuttal evidence to overcome the presumption of anticompetitive effects in future merger cases.

The opinion also underscores the challenges companies face in appealing the grant of a preliminary injunction at the trial court level. On multiple occasions, the 8th Circuit acknowledged that the companies had produced evidence in support of their arguments. However, the Court of Appeals repeatedly noted that "clear error" is the standard in reviewing factual findings, and in the 8th Circuit's estimation, the district court had not committed such error in weighing the evidence.

Finally, the FTC's victory serves as another reminder that healthcare antitrust enforcement remains a priority in the Trump administration, as both the FTC and Department of Justice, Antitrust Division continue to scrutinize transactions between competing providers.

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