

Amicus brief of ICLE and Professors and Scholars of Law and Economics, Rehearing En Banc, St. Alphonsus Medical Center et al. v. St. Luke's Health System, LTC, 9th Circuit April 16, 2015

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Summary

“...One of the core guiding principles of modern antitrust law is the focus on maximizing the welfare of consumers. This guiding principle should lead to the conclusion that the antitrust laws may be violated when a transaction reduces consumer welfare but not when consumer welfare is increased. The consumer welfare focus of the antitrust laws is a product of the same fundamental wisdom that underlies the Hippocratic Oath: *primum non nocere*, first, do no harm.

The decision of the Panel violates this principle and thus will harm consumers in the Ninth Circuit, and, insofar as it is followed in other Circuits, across the country. More specifically, the Panel takes several positions on proof of efficiencies that are contrary to the Horizontal Merger Guidelines and decisions in other Circuits. Chief among these positions are that “[i]t is not enough to show that the merger would allow St. Luke’s to better serve patients” and that “[a]t most, the district court concluded that St. Luke’s might provide better service to patients after the merger.” These positions are inconsistent with modern antitrust jurisprudence and economics, which treat improvements to consumer welfare as the very aim of competition and the antitrust laws.

If permitted to stand, the Panel’s decision will signal to market participants that the efficiencies defense is essentially unavailable in the Ninth Circuit, especially if those efficiencies go towards improving quality. Companies contemplating a merger designed to make each party more efficient will be unable to rely on an efficiencies defense and will therefore abandon transactions that promote consumer welfare lest they fall victim to the sort of reasoning employed by the panel in this case. Consequently, it is foreseeable that it will be a long time, if ever, that another panel of this Court will be able to revisit this issue that is critical to correct antitrust enforcement.

Compounding this problem is the fact that the Panel’s opinion fills something of a vacuum in efficiencies jurisprudence. Although efficiencies are recognized as an essential part of merger analysis, very little is written about them in most judicial decisions. The Panel’s decision will thus not only preempt potentially beneficial mergers but also the development of sound efficiencies analysis under Section 7.

The *amici* respectfully submit that the decision of the Panel is contrary to modern thinking on efficiencies in antitrust analysis and therefore urge the Ninth Circuit to rehear the case *en banc* in order to correct the defects in the Panel's decision and to provide clearer guidance and analysis on the efficiencies defense."

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