

## **Healthcare Antitrust Bootcamp Webinar Series, Part II: Mergers, Affiliations, and Acquisitions**

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by the Physician Organizations (Physicians) Practice Group*

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## Two Merger Programs

- This program: law
- November program: process

## Two Merger Programs

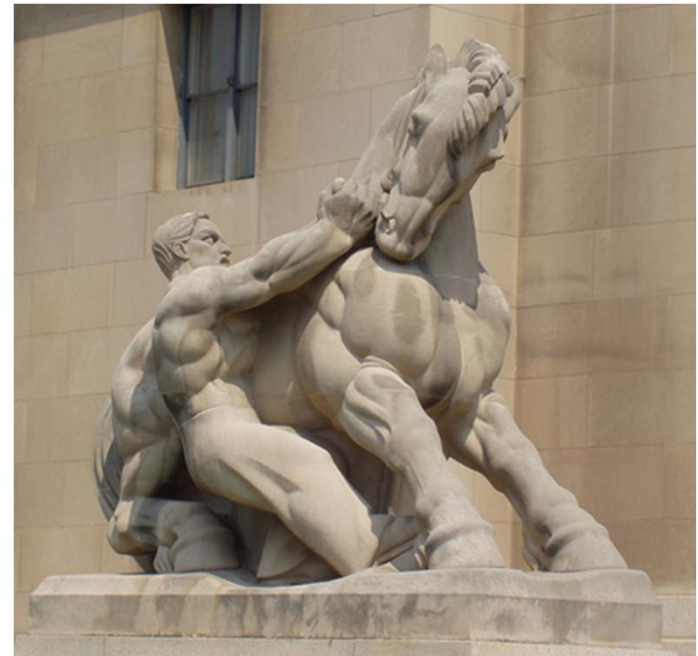
- This program: law
  - Mergers in healthcare
  - Legal framework for analysis
  - Analysis of a horizontal merger
- November program: process

# Mergers in Healthcare

- Providers
  - ☐ Hospitals
  - ☐ Physicians
  - ☐ Ancillary providers (e.g. lab companies)
- Health plans
- Kinds of mergers
  - ☐ Horizontal
  - ☐ Vertical

## Legal Framework

- Federal statutes
- Case law
- Federal enforcement agencies
  - Horizontal merger guidelines
  - Policy statements
  - Enforcement actions
  - Agency advice
- State enforcement
- Process
  - Hart Scott Rodino Act



## Analysis of a horizontal merger

- Theories of competitive harm: unilateral and coordinated effects
  - Ability to raise price (lower quality), not actual exercise
- Analysis: usually prospective
  - Can be retrospective

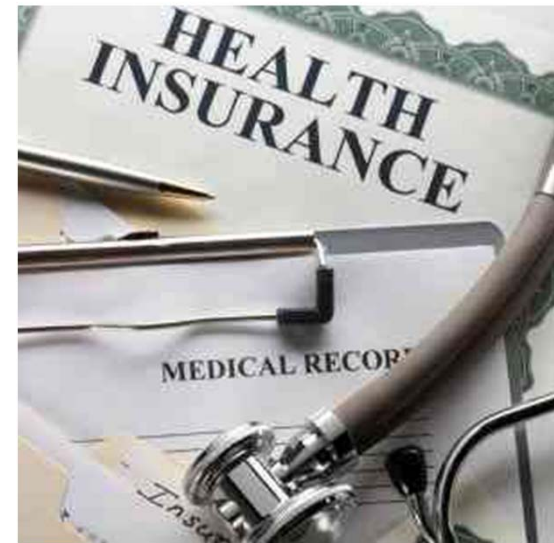
## Traditional Analysis

- Define a market and measure market shares as a method of inferring market power
- Market definition
  - General principle – reasonable substitutability
  - Hypothetical monopolist test
    - Small but significant and non-transitory increase in price (“SSNIP”)



## Product Market

- Hospitals
  - ☐ Cluster?
  - ☐ Service lines?
  - ☐ Outpatient facilities; ASCs
- Physicians
  - ☐ By specialty?
  - ☐ Is there overlap?
- Health plans

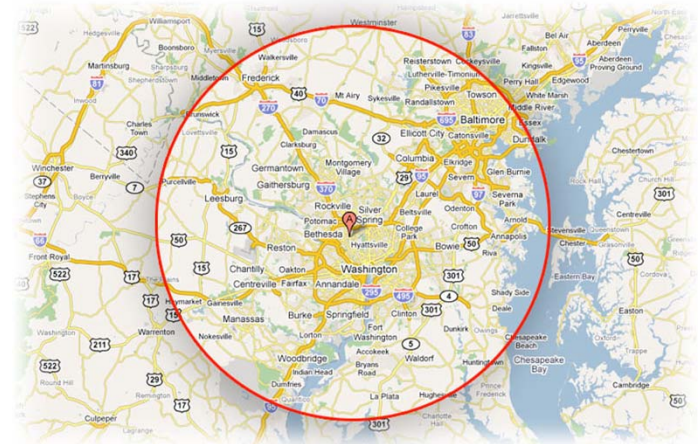






# Geographic Market

- Patient flow statistics
  - Elzinga-Hogarty



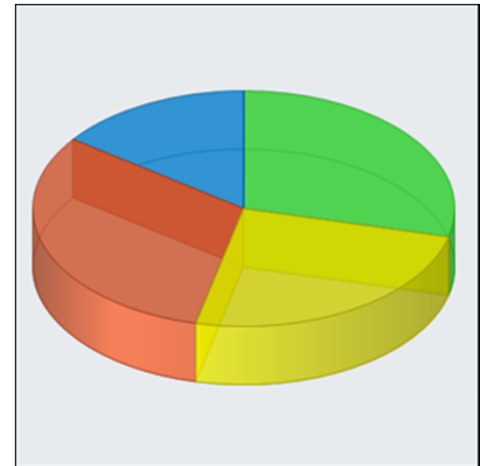
## Geographic Market

- Patient flow statistics
  - Elzinga-Hogarty
- Criticisms of patient flow statistics
  - Recent FTC complaints focus on sale of services to health plans



## Market Power

- Market shares
- Herfindahl-Hirschman Index (HHI)



# HHI

	Share (%)	HHI	Post merger share (%)	Post merger HHI
Hospital A	10	100	30	900
Hospital B	20	400		
Hospital C	30	900	30	900
Hospital D	40	1600	40	1600
	100	3000	1000	3400

## Significance of Increases in HHI

Below  
1500

- Unlikely to have anticompetitive effects

1500-2500

- >100 points: potentially raise significant concerns, often warrant scrutiny

Above  
2500

- 100-200: see above
- > 200: presumed likely to enhance market power (rebuttable)

## Market Power

- But:
  - Assumes a reliable market definition
  - And, HHI is primarily useful for coordinated effects cases
    - Hospitals: differentiated products – unilateral effects more likely to be the theory of harm
- Used as a screening mechanism

## New Approaches

- Is market definition necessary?
  - *Evanston*
  - The new Horizontal Guidelines
  - Extension from *Indiana Federation of Dentists*
- What else can assist in determining market power?
  - Two-stage competition
  - Simulations

## Efficiencies

- Typical claimed efficiencies
  - ☐ Acquired hospital will obtain acquiring hospital's expertise
  - ☐ Substantial investment in one party
  - ☐ New services
  - ☐ Cost savings/avoidance of duplicative spending
- How are they treated?
  - ☐ Merger specific
- Can efficiencies overcome a diminution in competition?
  - ☐ When do they matter?



## Ease of Entry

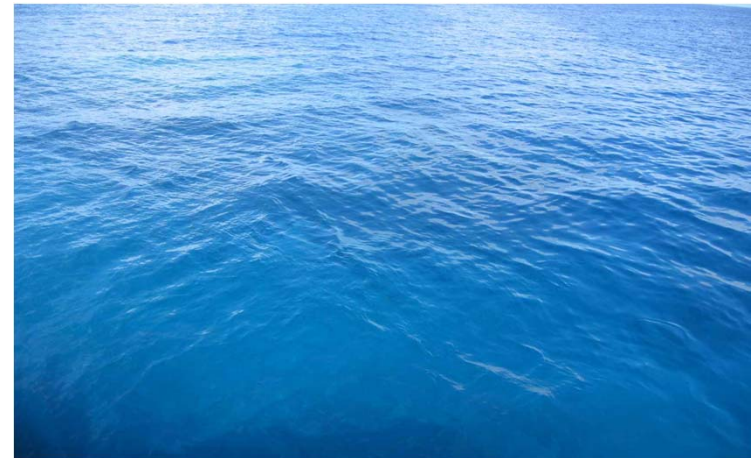
- Theory: is there a competitive response that would undermine an exercise of market power?
- Timely, likely, and sufficient
- Barriers to entry
- Questions
  - Can ASCs and other providers be a sufficient response to a hospital merger?
  - What barriers exist to physician entry?
  - Health plan mergers: can a small plan reposition to undermine competitive effects?

## Failing Firm

- Two prongs
  - Failed – unable to meet financial obligations and could not reorganize in BR under Chapter 11
  - There is no less anticompetitive purchaser
- FTC investigation
  - Scott & White acquisition of Kings Daughter (Texas 2009)

## Flailing Firm

- Hospital's financial weakness or declining position may reduce competitive concerns
- *General Dynamics*
  - Past or current strength as a competitor is **not** good predictor of future



# Vertical Mergers

## ■ Examples

- ☐ Hospital acquisition of physician groups
- ☐ Health system acquisition of health plan

## ■ Why the push to integrate?

- ☐ Continuum of care
- ☐ Influence physician behavior
- ☐ Stark; fraud & abuse
- ☐ Medicare reimbursement

## ■ Theories of harm

## A Brief History of Litigated Hospital Mergers/Issues

- 1980s – 1990s: Government litigated and entered into consent decrees on multiple hospital mergers
- 1995 – 2000: six litigated losses
  - Three FTC cases
  - Two DOJ
  - One California
- Lost on:
  - Relevant geographic market
  - Nonprofit status

## A Brief History of Litigated Hospital Mergers/Issues

- FTC retrenched, then:

- ☐ Evanston
- ☐ Inova
- ☐ LabCorp
- ☐ Lundbeck (Ovation)
- ☐ Phoebe Putney
- ☐ ProMedica

- Antitrust Division:

- ☐ Health plan mergers

## Other

- Small hospital safety zone
- State action
  - *Phoebe Putney*
- State COPA statutes

## Sources of Evidence

- Data
- Testimony from customers, competitors, and others
- Internal documents



## Internal Documents

Avoid:

- Merger will build “negotiating strength with payers.”

*Highland Park management*



## Internal Documents

Avoid:

- Merger will “strengthen negotiation capability with managed care companies through merged entities.”

*Evanston management*



## Documents

- ProMedica offers “incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though.”

St. Luke's CEO

## Documents

- “A ProMedica ... affiliation could still stick it to employers, that is, to continue forcing high rates on employers and insurance companies.”

St. Luke's Marketing/Planning Director





# Questions?

# Reading

## Hospital Merger Cases

- *In re American Medical International*, 104 FTC 1 (1984)
- *In re Hospital Corporation of America*, 106 F.T.C. 361 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986)
- *United States v. Carilion Health Systems*, 707 F. Supp. 840 (W.D. Va. 1989), *aff'd*, 892 F.2d 1042 (4th Cir.)
- *United States v. Rockford Memorial*, 717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990)
- *FTC v. University Health, Inc.*, 1991-1 Trade Cases ¶69,400 (S.D. Ga.) and 1991-1 Trade Cases ¶69,444 (S.D. Ga.), *rev'd*, 938 F.2d 1206 (11th Cir. 1991)
- *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 1997-2 Trade Cas. ¶71,863 (6th Cir. 1997)

## Reading

### Hospital Merger Cases (cont.)

- *FTC v. Freeman Hospital*, 1995-1 Trade Cas. ¶71,037 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995)
- *United States v. Mercy Health Services*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated*, 107 F.2d 632 (8th Cir. 1997)
- *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997)
- *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999)
- *State of California v. Sutter Health System*, 2000 WL 194832 (N.D. Cal. 2000)
- *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, FTC Docket No. 9315 (2007) (available at [www.ftc.gov/os/adjpro/d9315/index.shtm](http://www.ftc.gov/os/adjpro/d9315/index.shtm))

## Reading

### Hospital Merger Cases (cont.)

- *In the Matter of Inova Health System Foundation and Prince William Health System, Inc.*, FTC Docket No. 9326 (2008) (available at <http://www.ftc.gov/os/adjpro/d9326/index.shtm>)
- *Scott & White and King's Daughter* (FTC 2009) (available at [www.ftc.gov/os/closings/091223scottwhitestmt.pdf](http://www.ftc.gov/os/closings/091223scottwhitestmt.pdf))
- *Phoebe Putney Health System, Inc.*, D. 9348, FTC File No. 111-0067 (complaint issued April 20, 2011) (available at [www.ftc.gov/os/adjpro/d9348/index.shtm](http://www.ftc.gov/os/adjpro/d9348/index.shtm))
- *Federal Trade Commission v. ProMedica Health System*, Case No. 3:11 CV 47 (March 29, 2011) (findings of fact and conclusions of law); *ProMedica Health System*, C-9346 (complaint issued January 6, 2011)



## Reading

### Other

- *U.S. v. General Dynamics Corp.*, 415 U.S. 486 (1974)
- *U.S. and State of Florida v. Morton Plant Health System, Inc. and Trustees of Mease Hospital, Inc.*, No. 94-748-CIV-T-23E (M.D. Fla. 1994) (available together with subsequent enforcement action at [www.justice.gov/atr/cases/morton.htm](http://www.justice.gov/atr/cases/morton.htm))
- In the matter of the application for a certificate of public advantage by the Columbus Hospital and Montana Deaconess Medical Center, Great Falls, Montana (Montana Department of Justice, 1996)
- *In the Matter of Carilion Clinic*, FTC Docket No. 9338 (2009) (available at [www.ftc.gov/os/adjpro/d9338/index.shtm](http://www.ftc.gov/os/adjpro/d9338/index.shtm))
- *HTI Health Services v. Quorum Health Group*, 960 F. Supp. 1104 (S.D. Miss. 1997)

# Reading

## Government Guidelines and Reports

- *Statements of Enforcement Policy in Health Care* (FTC and Department of Justice, 1996) (available at [www.ftc.gov/bc/healthcare/industryguide/policy/index.htm](http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm))
- *Improving Health Care: A Dose of Competition* (FTC and Department of Justice, 2004) (available at [www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf](http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf))
- *Horizontal Merger Guidelines* (FTC and Department of Justice, 2010) (available at <http://ftc.gov/os/2010/08/100819hmg.pdf>)
- *Antitrust Guidelines for Collaborations Among Competitors* (FTC and Department of Justice, 2000) (available at [www.ftc.gov/os/2000/04/ftcdojguidelines.pdf](http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf))

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