

Antitrust Update

*Washington State Society of Health Care Attorneys
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Overview

- Provider consolidation
- Exclusionary behavior
- ACOs
- Documents





Provider consolidation

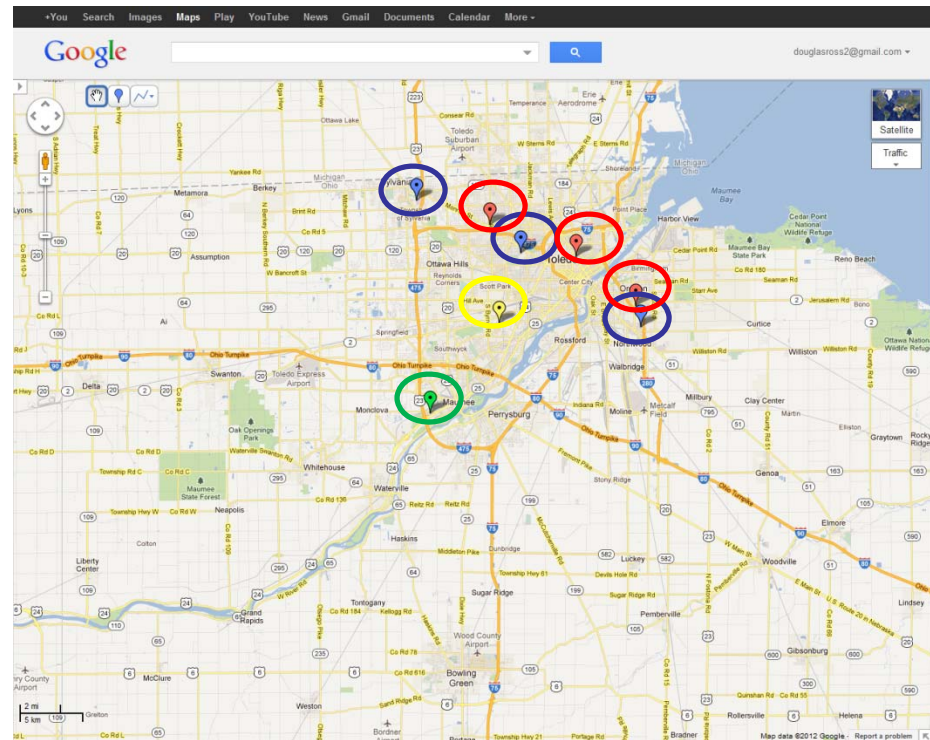
- Hospitals
 - Toledo, OH (ProMedica)
 - Rockford, IL (OSF)
 - Albany, GA (Phoebe Putney)
 - ... Roswell, N.M
- Physician consolidation
- Puget Sound



Toledo (ProMedica)

- 4-3 hospital merger
- 3-2 OB

ProMedica 
St. Luke's 
Mercy 
UTMC 



Toledo (ProMedica)

Market definition

- No dispute on geographic market
- Dispute on **service market**

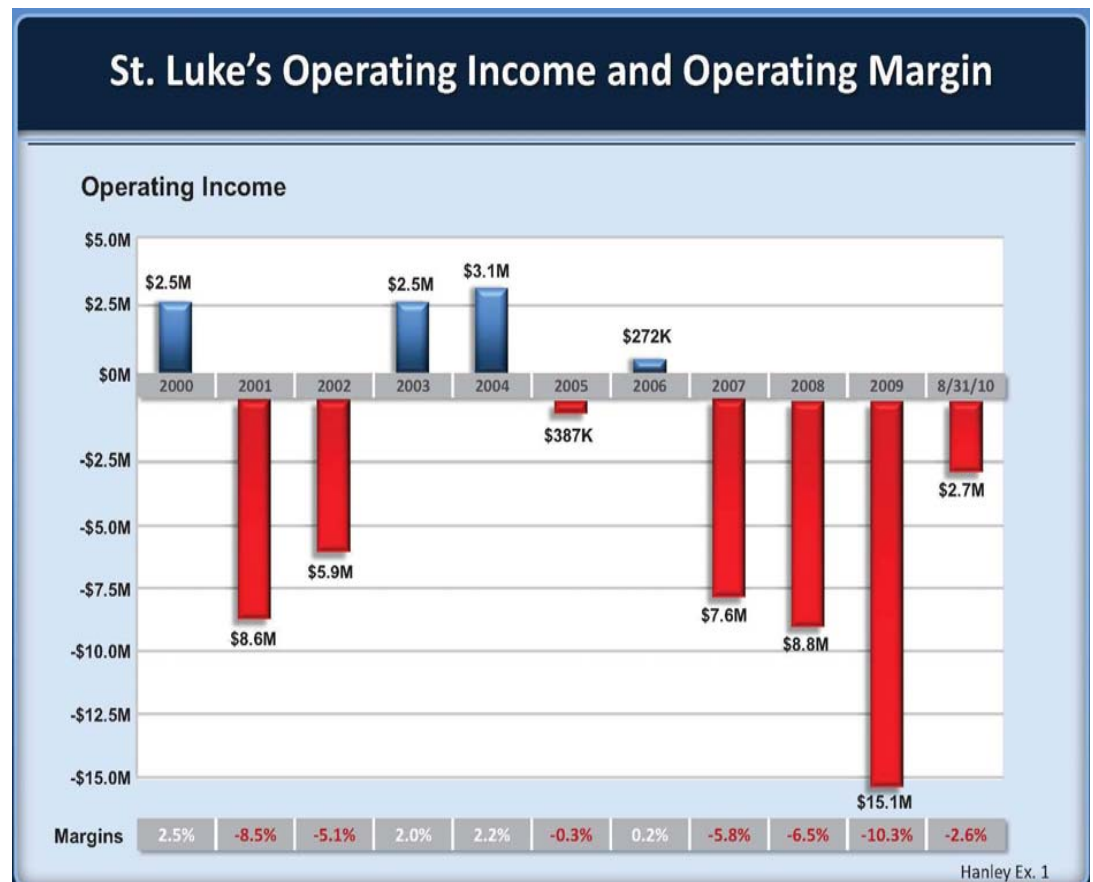
Who cares?

- Share, HHI increases were substantial either way

Toledo (ProMedica)

Flailing firm?

- St. Luke's lost \$ since 2007
- One month of profitability in that time



Toledo (ProMedica)

FTC response:

- St. Luke's left money on the table
 - Is “learning about demand” OK after all?
- Market share would have to decline to 2% to pass the HHI screens
- Could survive 3 to 5 years
- Most important evidence:
 - Other possible buyers



Toledo (ProMedica)

- Use of bargaining theories, econometric evidence
- No conduct remedy
- The Rosch concurrence...



“...the Commission should not needlessly resolve all of the thorny issues that surround the ‘willingness to pay’ models or saddle an appellate court with those issues either.”

Toledo (ProMedica)

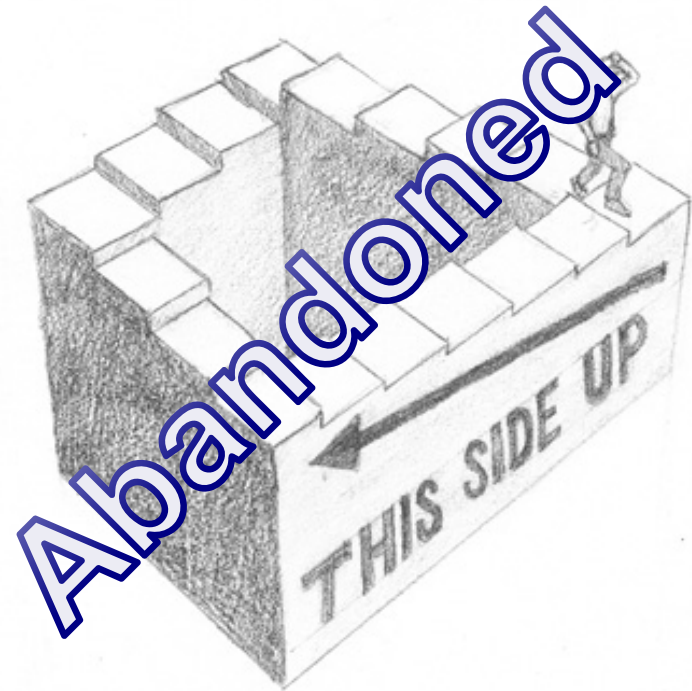
- Use of bargaining theories, econometric evidence
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- The Rosch concurrence...



“...Critics have charged that such studies always predict a price increase if there is any degree of substitution between the merging parties’ products. *See Statement of Commissioner J. Thomas Rosch* on the Release of the 2010 Horizontal Merger Guidelines at 3-4 (Aug. 19, 2010).”

Rockford (OSF Healthcare)

- *Déjà vu?* Hospital Merger in Rockford
- Court enjoins merger pending FTC hearing
 - 3-2 merger: 64% acute share
 - PCP market not adjudicated
- Rejects:
 - “Butterworth” stipulation
 - MCO defense
 - Efficiencies claims



Georgia (Phoebe Putney)

Georgia



Georgia (Phoebe Putney)

- Two hospitals in Albany, GA
 - 85% market share between them
- Phoebe Putney Hospital
 - Owned by County Hospital Authority
 - 1991: Leased to Phoebe Health System
- Palmyra
 - Authority to buy Palmyra, with Phoebe's \$, lease to Phoebe Health System

Georgia (Phoebe Putney)

- FTC: straw man
- 11th Cir: state action
- Supreme Court granted cert
 - Argument 11/26



Is no deal too small?

- January 2012: FTC derailed acquisition of a 26-bed hospital in Roswell, N.M.



- What happened to the 100-bed safety zone?

Physician mergers – Renown

- One of several hospitals & systems in Reno area
- Cardiology acquisitions
 - Acquired a cardiology group (15)
 - Then a second (16)
 - Only one independent left



Physician mergers – Renown

- FTC mandated relief:
 - Release up to ten cardiologists from noncompetes
- Would this be the relief if the FTC had not challenged after the fact?
- Note involvement of Nevada



Mergers, affiliations in Puget Sound

“CHI, PeaceHealth Agree to form Integrated Regional Health Care Network to Serve Northwest”

- MultiCare ↔ Good Samaritan (Puyallup) 2006
- UW ↔ Northwest 2009
- UW ↔ Valley Medical (Renton) 2011
- Providence Health & Services ↔ Swedish 2012
- MultiCare ↔ Auburn Regional 2012

MultiCare 
Good Samaritan Hospital



Mergers and affiliations: takeaways

- Product market
 - Cluster markets
 - Or ... physician specialty
- Geographic market
 - Historical area of weakness for agencies
 - Views of health plans, parties, hospitals, and employers
 - Patient flow



Mergers and affiliations: takeaways

- Defining geographic markets leads to poor results
- Instead: evaluate hospital deals using demand models



Leemore Dafny, the FTC's deputy director for health care and antitrust

Mergers and affiliations: takeaways

- “Since we have the tools ... we would like to make use of those tools,” Dafny said.



Leemore Dafny, the FTC's deputy director for health care and antitrust

Mergers and affiliations: takeaways

Relief

- “Regulatory decrees”
 - PA Attorney General
 - Geisinger
 - FTC
 - Reno
 - Evanston

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Exclusionary behavior

- Exclusion by providers
- Exclusion by payers
- Providers and payers working together to exclude others

Exclusion by providers

North Carolina Board of Dental Examiners

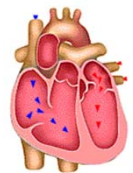
- FTC: state dental board blocks non-dentists from whitening
- Board claimed state action
 - FTC denied MTD (insufficient supervision)
- Board filed in district court:
 - Motions for dec relief and PI denied



Exclusion by providers

Deborah v. Penn Presbyterian

- Exclusion case survives *Iqbal*
- Deborah Heart and Lung Center
 - Referral center for advanced cardiac procedures
- Virtua Health
 - Three hospitals; principal ED in market
 - A cardiology group exclusive to Virtua
 - U. Penn exclusive recommended referral site for group



Exclusion by providers

- District court
 - Refused to dismiss Deborah's §1 claim of exclusion from referrals
 - Dismissed §2 monopolization claim




Exclusion by payers

Michigan BCBS

- MFN and MFN “plus” clauses
- Claim: BCBS has market power
 - 60% market share
- MFNs with > half the hospitals in state
- DOJ and private litigation

Payer vs. Provider

The players

- West Penn Allegheny  < 25%
- UPMC  > 50%
- Highmark BCBS  > 60%-80%



Payer vs. Provider

The story so far ...



Payer vs. Provider

The story so far ...



“UPMC offered a ‘truce’ to Highmark”



Payer vs. Provider

The story so far ...



West Penn v. UPMC and Highmark

- Claim: UPMC protected Highmark
 - UPMC shrunk its affiliated health plan
 - Would not contract on favorable terms with Highmark's rivals



Payer vs. Provider

The story so far ...



West Penn v. UPMC and Highmark

- Claim: Highmark protected UPMC
 - Paid UPMC too much
 - Paid West Penn too little
 - Offered no plan without UPMC
 - Gave UPMC \$ for children's hospital
 - Cut off West Penn from financial support



Payer vs. Provider

The story so far ...



West Penn v. UPMC and Highmark

- Claim: UPMC also engaged in unilateral efforts to damage West Penn
 - UPMC raided key Drs. from West Penn
 - Paid Drs. too much (a “bloated” salary to a bariatric surgeon...)”)
 - Pressured community hospitals to joint venture with it and not West Penn



Payer vs. Provider

The story so far ...



West Penn v. UPMC and Highmark

- District court granted MTD for failure properly to allege agreement or injury
- Court of Appeals reversed
 - Sufficient allegations of conspiracy
 - Sufficient allegations of injury: Highmark's reduction in reimbursement paid to West Penn



Payer vs. Provider

The story so far ...



*... West Penn and Highmark
announced plans to merge...*

Antitrust Division issued a closing
statement in April 2012:

- Vertical affiliation
- No foreclosure concerns



DOJ statement on long term contracts

- Long-term contracts between dominant hospital and insurer can dull incentives to compete
- Hospital may less likely to promote the growth of new insurers by offering them competitive rates



DOJ statement on long term contracts

- If dominant health insurer is guaranteed rates from a dominant hospital for an extended period, then insurer may be less likely to promote competition in the hospital market by investing in more affordable hospitals

DOJ statement on long term contracts

- Shorter contracts are better
- The foreseeable expiration of the contracts increases the need for both the dominant hospital and the insurer to have alternatives to their dominant counterparts”

Dominant payer meets dominant provider

Background for:

- Payor and PBM mergers
- West Penn/Highmark
- Hospital mergers

Economic account:

- Uncertain welfare results
- Countervailing power
("Sumo wrestler") view:
Pro-consumer results

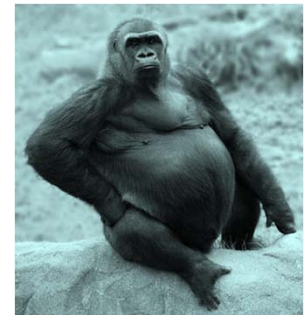


Single system contracting

Contracting as a system

- “Take one hospital, must take others/all”
- “Take the hospital, must take physicians”

Unlawful leverage?



Single system contracting

■ California investigation: contracting practices



Wall Street Journal
9/13/2012

Single system contracting

- California investigation: contracting practices



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ACOs

- FTC & DOJ Policy Statement
 - Assume clinical integration
 - Rule of reason
 - Safety zones
- GAO review of governmental advice
 - “Experts” and “industry” evaluation
 - Verdict: doing well!



ACOs

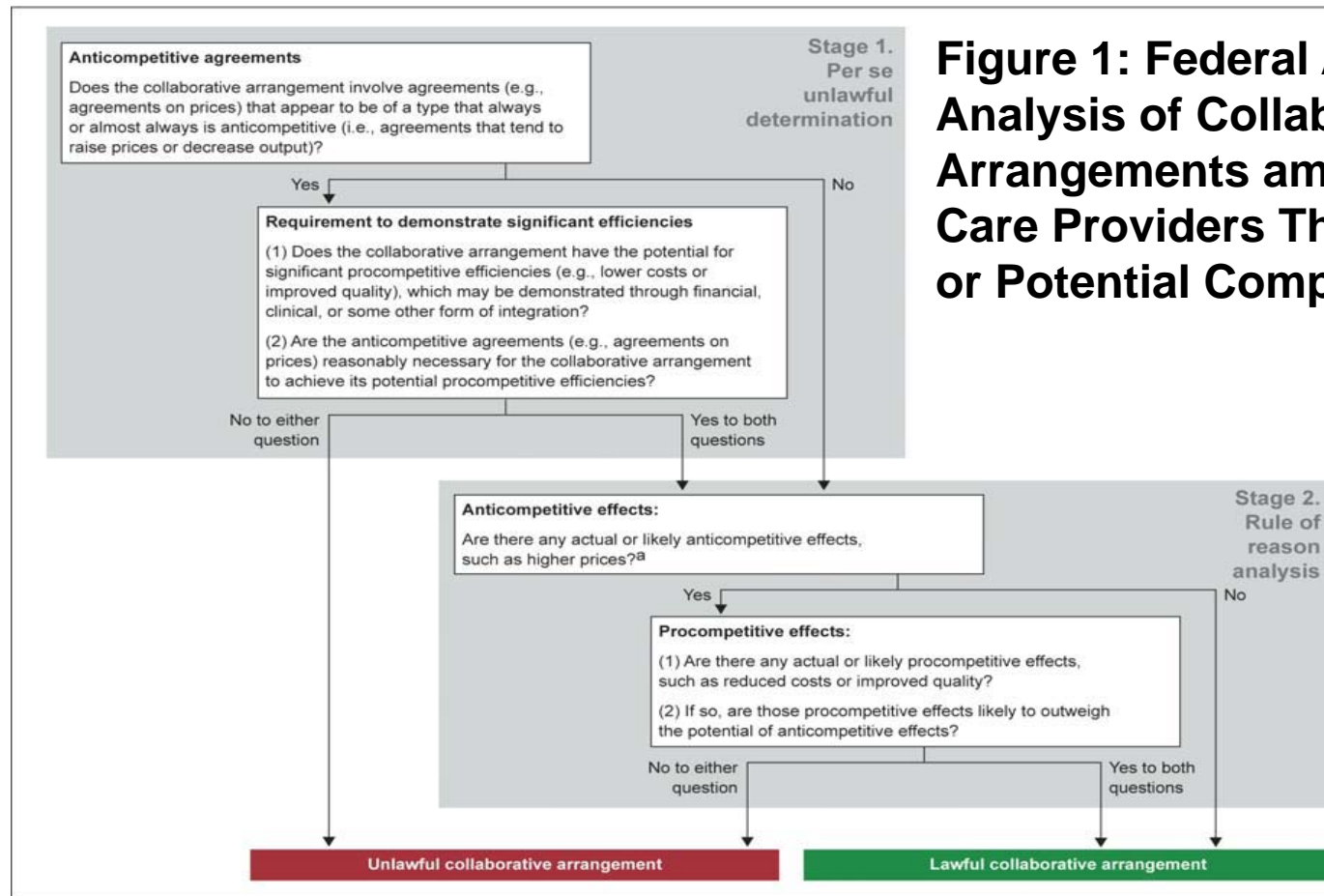


Figure 1: Federal Antitrust Analysis of Collaborative Arrangements among Health Care Providers That Are Actual or Potential Competitors

Sources: GAO analysis of guidance from DOJ and the FTC on federal antitrust enforcement policy for physician and multiprovider arrangements in health care and interviews with officials from these agencies.

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Documents ... Evanston

Premerger board minutes

The merger will “increase our leverage ... with the managed care players and help our negotiating posture.”



Documents ... Evanston

Post-merger board minutes

“the larger market share created by adding Highland Park Hospital has translated to better managed care contracts ...”

Documents ... Evanston

Post-merger board minutes

“...none of this could have been achieved by either Evanston or Highland Park alone...”

Documents ... Evanston

Post-merger board minutes

“The ‘fighting unit’ of our three hospitals and 1600 physicians was instrumental in achieving these ends.”



Documents ... ProMedica

What Does the Acquisition Change?



- Pre-Acquisition, an independent St. Luke's was competitively significant

PX1144 003

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St. Luke's Hospital Access to Marketplace

A. Who cares about St. Luke's Hospital's independence?

1. Employees/Potential Patients	2. Employers	3. MCO's
<p>Do we need to create demand through PR and advertising?</p> <ul style="list-style-type: none"> - Create fear - Create expectations <p>Invest here.</p>	<p>They want value. Why should employers care about St. Luke's independence? What is the marketing plan?</p>	<p>The reason these organizations should care is that an independent St. Luke's Hospital keeps the systems a little more honest. MCOs lose clout if St. Luke's is no longer independent.</p> <ul style="list-style-type: none"> - Anthem - MMO - UHC - Aetna

SLH

- Gives choice, - customer service, - quality, etc.

PX1144 003

SLH06/7/37

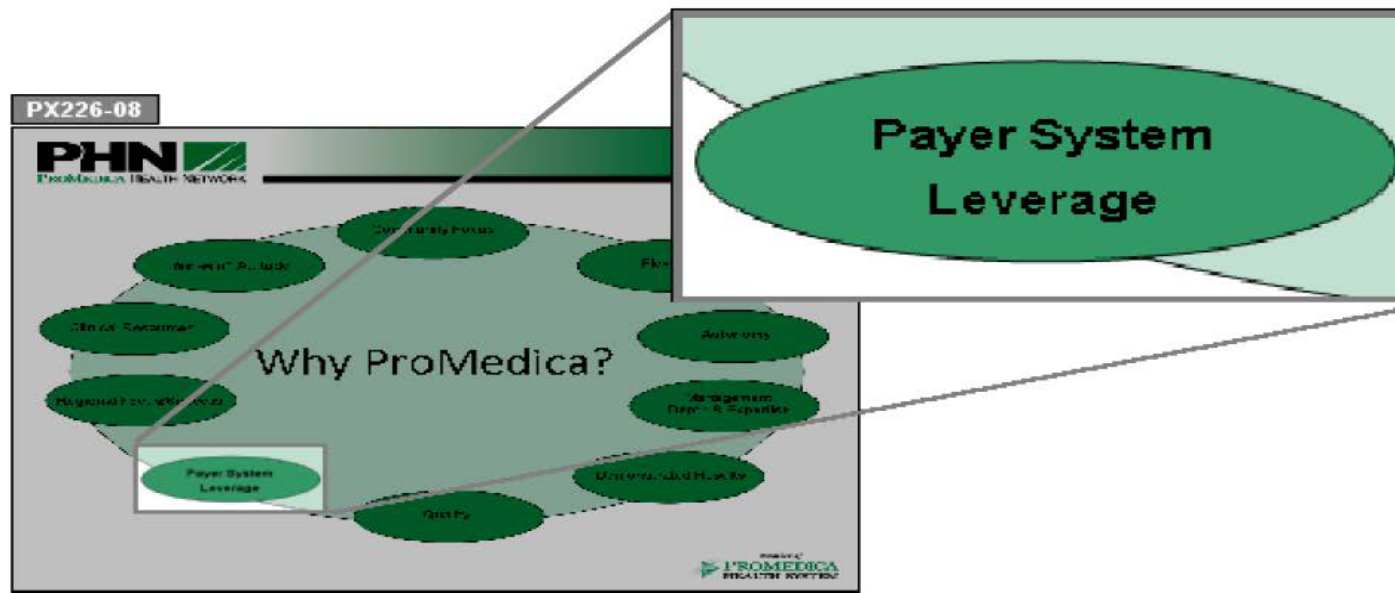
The reason these organizations should care is that an independent St. Luke's Hospital keeps the systems a little more honest. The MCOs lose clout if St. Luke's is no longer independent.

Documents ... ProMedica

Acquisition Leads to Increased Leverage and Higher Rates



- ProMedica was aware of its bargaining leverage with health plans



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Draft Presentation: ProMedica Health Network ProMedica Partnerships (late 2009/early 2010) (PX00226 at 8)

Documents ... ProMedica

Acquisition Leads to Increased Leverage and Higher Rates



- St. Luke's viewed increased bargaining leverage and access to higher rates as principal benefits of Acquisition:

ProMedica:

- An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-SLH partnership would have a lot of negotiating clout.

Presentation to St. Luke's Board of Directors, 10/30/09 (PX01030 at 20, *i/c*)

Two things Promedica brings to the table are strong market/capital position, and 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.

Email from D. Wakeman to Board of Directors, 10/11/09 (PX01125 at 2, *in camera*)

Option 3: Affiliate with ProMedica. What do they bring?

Strong managed care contracts.

Presentation by D. Wakeman, 2009 (PX1018 at 14, *in camera*)

Questions