

Healthcare Transactions Bootcamp Webinar Series, Part III: Antitrust Implications for Innovative Transactions

This bootcamp webinar series is brought to you by the In-House Counsel (In-House) Practice Group, and is cosponsored by the Antitrust; Business Law and Governance (BLG); Fraud and Abuse (Fraud); Health Information Technology (HIT); Hospitals and Health Systems (HHS); Labor and Employment (Labor); Medical Staff, Credentialing, and Peer Review (MSCPR); Payors, Plans, and Managed Care (PPMC); Physician Organizations (Physicians); Regulation, Accreditation, and Payment (RAP); Tax and Finance (Tax); and Teaching Hospital and Academic Medical Centers (THAMC) Practice Group.

March 19, 2013 • 1:00 − 2:30 pm

David Marx, Esquire,

Partner, McDermott Will & Emery, Chicago, IL dmarx@mwe.com

Jeffrey Perry,

Assistant Director, Bureau of Competition, Mergers IV Division, Federal Trade Commission, Washington, DC, jperry@ftc.gov

Douglas Ross, Esquire,

Partner, Davis Wright Tremaine LLP, Seattle, WA, douglasross@dwt.com





Disclaimer

 Jeffrey Perry's remarks reflect his own views and not necessarily those of the Commission or any Commissioner





Overview

- Transactions covered
- Substantive law
- Recent governmental and private litigation
- How to identify transactions that raise antitrust issues
- Government investigation process
- How to avoid antitrust issues





Transactions covered

- Mergers, acquisitions and other affiliations
 - ☐ Hospitals; physicians
 - □ Hospital acquisitions of physician practices
- Joint ventures
- Provider networks
- Non-profit and for-profit entities
- What we don't cover today: provider networks





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MERGE

Substantive law

- Hart-Scott-Rodino Act
- Clayton Act (§ 7)
- Sherman Act (§§1, 2)
- Horizontal Merger Guidelines
- Statements of Antitrust Enforcement Policy in Health Care Policy (1996)
- ACO Policy Statement (2011)





HSR Act

- What transactions are potentially subject to HSR Act?
 - Acquisitions of
 - Voting Securities
 - Assets
 - Controlling interest in a non-corporate entity
 - Acquisitions of control of a not-for-profit entity are treated as the acquisition of 100% of the assets of the entity
 - ☐ Formations of joint venture corporations or non-corporate entities
 - Formation of not-for-profit corporations or unincorporated entities exempt







HSR Act

- Jurisdictional Thresholds
 - Size-of-Transaction
 - \$70.9 million or more where the parties meet the size-of-person test
 - More than \$283.6, regardless of the sizes of the parties
 - □ Size-of-person thresholds generally met if
 - One person has net sales or total assets of \$141.8 million or more
 - One person has net sales or total assets of \$14.2 million or more
- Exemptions may apply
- If thresholds met and no exemptions:
 - □ File notice with FTC, DOJ, pay fee
 - □ Wait 30 days (or more if a second request)







Framework for analyzing mergers, joint ventures

- Issue: will the transaction result in increased market power?
- Define relevant market
 - □ Product (service) market
 - □ Geographic market
- Identify competitors, determine market shares, concentration
- Does market share = market power?
 - □ Is entry or expansion possible? When? On what scale?
 - Efficiencies
- Failing and "flailing" companies





Define relevant market

- General principle: reasonable substitutability
- Hypothetical monopolist test
 - □ Small but significant and non transitory increase in price







Product (service) market

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







Geographic market

- Where can purchasers obtain relevant services?
 - □ Payers (adequate networks)
 - □ Patients (willingness to travel)
- Significance of patient flow statistics

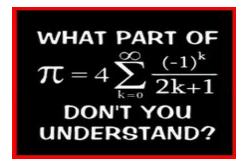






Market power

- Market shares
- Herfindahl-Hirschman Index (HHI)
 - Assumes a reliable market definition
 - □ Used as a screening mechanism
 - □ Under 30%: competitive issues unlikely?
- Evidence of direct anticompetitive effects







Efficiencies

- Typical claimed efficiencies
 - Cost savings, avoidance of duplicative spending
 - Enhanced quality
 - □ New services
- Must be merger specific
- When do they matter?
 - □ Can efficiencies overcome a diminution in competition?





Entry, expansion, repositioning

- Theory: is there a competitive response that would deter or undermine an exercise of market power?
- Must be timely, likely and sufficient
- Barriers to entry?





Failing firm

- Two prongs
 - □ Failing unable to meet financial obligations and cannot 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
- Two cases
 - □ General Dynamics: past or current strength as a competitor is not good predictor of future
 - □ ProMedica (Toledo hospital merger)







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Government hospital merger history

- 1980s-1990s: Government litigated and entered into consent decrees on multiple hospital mergers
- 1995-2000: Six litigated losses
- Lost on:
 - □ Relevant geographic market
 - □ Non-profit status





But in the 2000s

- FTC retrenched, then:
 - □ Evanston
 - □ Inova
- Does the ACA encourage more tolerant antitrust enforcement?
- Recent actions
 - □ Phoebe Putney
 - □ ProMedica
 - □ OSF
 - □ Reading Health System



ProMedica (Toledo)

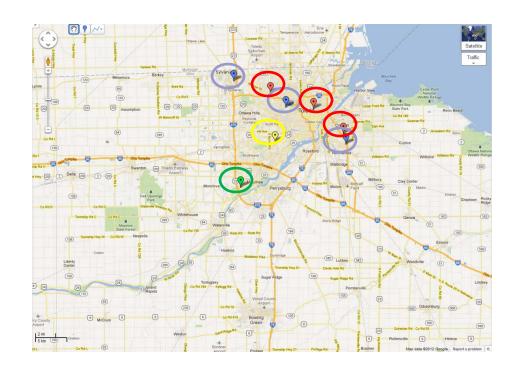
- 4-3 hospital merger
- 3-2 OB

ProMedica

St. Luke's

Mercy

UTMC







St. Luke's - flailing firm? ProMedica's view...

- St. Luke's lost \$ since 2007
- One month of profitability in that time
- Hiring freeze, pay cut



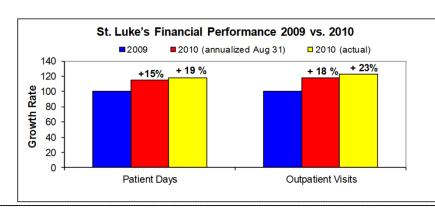


St. Luke's - flailing firm? FTC's view...

St. Luke's Finances Were Improving

- Mr. Den Uyl admitted financial condition "improved" in eight months leading up to Acquisition (Den Uyl, Tr. 6562)
- Undisputed volume growth up to Acquisition:
 - Revenues
 - Market share
 - Inpatient admissions
- Outpatient visits
- Patient days
- Occupancy rate

(see Resp't Reply Br. at 64-65)

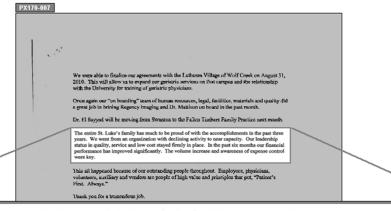






St. Luke's - flailing firm? FTC's view...

CEO's Last
 Words to the
 Board on Behalf
 of an
 Independent St.
 Luke's



The entire St. Luke's family has much to be proud of with the accomplishments in the past three years. We went from an organization with declining activity to near capacity. Our leadership status in quality, service and low cost stayed firmly in place. In the past six months our financial performance has improved significantly. The volume increase and awareness of expense control were key.







Government action on the physician front

FTC

- □ Boise, Idaho (St. Luke's)
- □ Reno, Nevada (Renown)
- □ Spokane, Washington
- □ Rockford, Illinois (OSF Healthcare)

States

- Pennsylvania
- Maine







Takeaways

- Degree of market concentration
 - ☐ Most cases are not in large urban centers
- Financial distress
 - □ Strict scrutiny
- Role of efficiencies
- Size of transaction





Is no deal is too small?

Reading – target had 15 beds



Is no deal is too small?

 Roswell, N.M. FTC investigated acquisition of 26-bed hospital (January 2012)





What happened to the 100-bed safety zone?





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What transactions raise antitrust issues?

- Mergers, acquisitions
- Affiliations
 - ☐ Many innovative transactions
 - Religious/secular
 - Government/private
- Joint ventures





Mergers, acquisitions









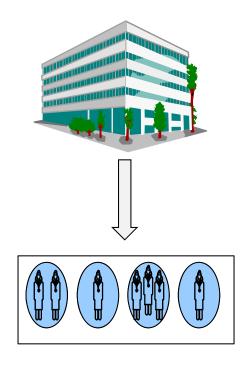
It's not just hospital mergers ...

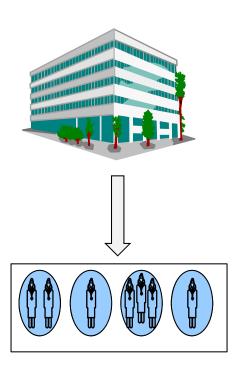
- Carilion Clinic/Odyssey Centers (FTC 2009)
 - □ Post-consummation challenge
 - Dominant hospital system purchased strong independent outpatient centers
 - Evidence of price and quality competition
 - First litigation challenge to a merger between a hospital and outpatient provider resulted in a complete unwinding of the transaction





Transactions with hospitals and medical groups

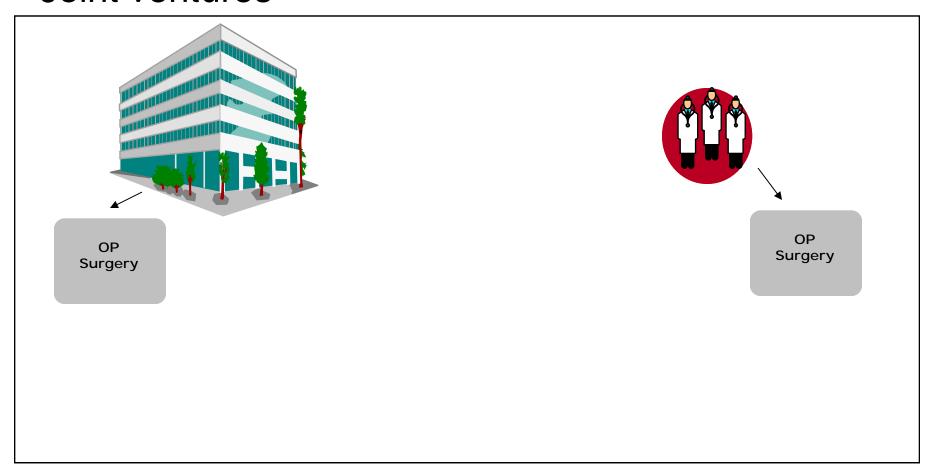








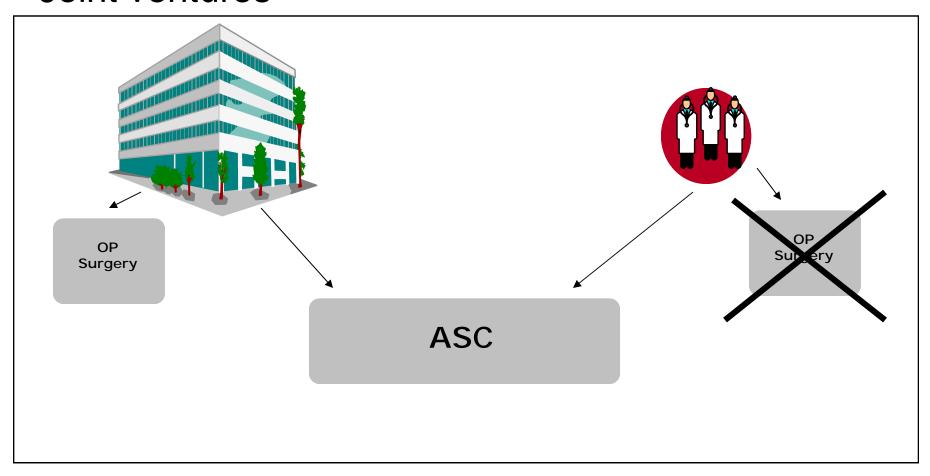
Joint ventures







Joint ventures







Joint ventures

- Price fixing?
 - □ Degree of control of hospital over joint venture
- Market power?
 - □ Look to other competitors in market





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Government investigation process

- How do the agencies learn of a transaction?
 - ☐ HSR
 - Complaints
 - Press
- How do the agencies obtain information?
- What do the agencies consider?
 - Market concentration
 - Documents
 - □ Views of health plans
 - □ Views of state Attorney General





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How to avoid antitrust issues

- Focus on consumers (patients and purchasers)
 - Cost savings
 - Quality
 - □ Broaden services and access
- Efficiencies are drivers for deal rather than afterthoughts
 - It's not about the rates
- Avoid bad documents





Premerger board minutes

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







Post merger board minutes

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







Post merger board minutes

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







Post merger board minutes

"The 'fighting unit' of our three hospitals and 1600 physicians was instrumental in achieving these ends."





E 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)

An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. ... a lot of negotiating clout."

run. ProMedica brings to the table ... 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."





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 Sys., 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. III. 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)





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. lowa 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)





Hospital merger cases (cont.)

- 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)
- 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 <u>www.ftc.gov/os/closings/091223scottwhitestmt.pdf</u>)
- In the Matter of ProMedica Health System, Inc., Docket No. 9346 (March 28, 2012) (available at http://www.ftc.gov/opa/2012/03/promedica.shtm)





Hospital merger cases (cont.)

- FTC v. Phoebe Putney Health Sys., No. 11-1160, (U.S. Feb. 19, 2013) (available at http://www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf)
- FTC v. OSF Healthcare Sys. and Rockford Healthcare Sys., No. 11 C 50344 (N.D. III. April 5, 2012) (available at www.ftc.gov/os/caselist/1110102/120505rockfordmemo.pdf)
- St. Alphonsus Medical Ctr., Nampa, Inc. v. St. Luke's Health Sys., No. 1:12-CV-00560-BLW (filed Nov. 12, 2012) (available at https://www.healthlawyers.org/Members/PracticeGroups/Antitrust/emailaler-ts/Documents/121120_Complaint.pdf)
- FTC v. St. Luke's, press release issued March 12, 2013 (available at www.ftc.gov/opa/2013/03/stluke.shtm)
- In the Matter of Reading Health Sys. and Surgical Institute of Reading, (filed Nov. 16, 2012) (available at www.ftc.gov/os/adjpro/d9353/121116readingsurgicalcmpt.pdf)





Other cases

- U.S. v. General Dynamics Corp., 415 U.S. 486 (1974)
- In the Matter of Carilion Clinic, FTC Docket No. 9338 (2009) (available at www.ftc.gov/os/adjpro/d9338/index.shtm)





Government Guidelines and Reports

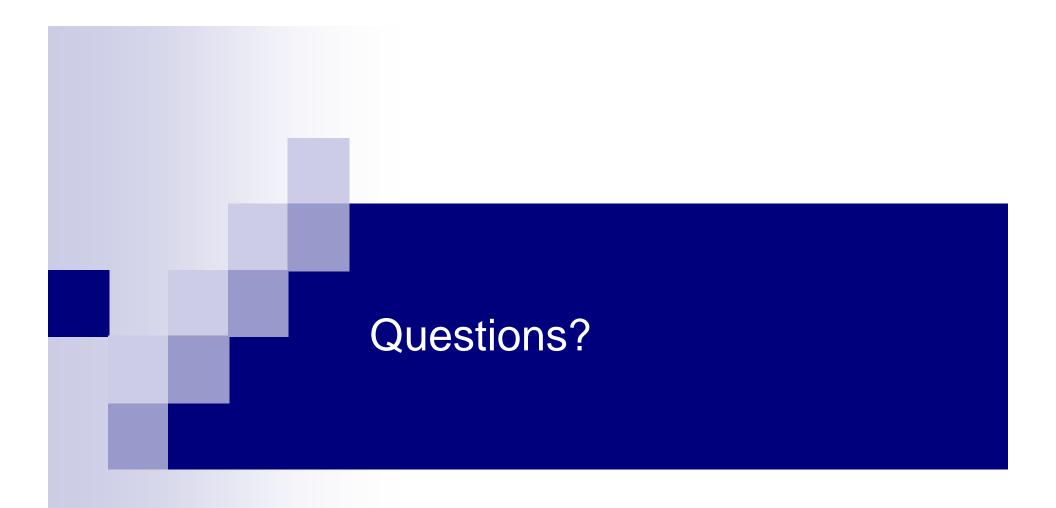
- Statements of Enforcement Policy in Health Care (FTC and Department of Justice, 1996) (available at <u>www.ftc.gov/bc/healthcare/industryguide/policy/index.htm</u>)
- Antitrust Guidelines for Collaborations Among Competitors (FTC and Department of Justice, 2000) (available at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf)
- Improving Health Care: A Dose of Competition (FTC and Department of Justice, 2004) (available at 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)





Additional Resources

- HSR-Related Resources
 - Premerger Notification Office website:
 http://www.ftc.gov/bc/hsr/index.shtm (includes instructions, guidelines, informal interpretations, and more)
 - □ ABA Section of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007)
 - □ 1978 Statement of Basis and Purpose (43 F.R. 33450)





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