



Antitrust Implications and Lessons Learned from the Ninth Circuit Decision in *St. Luke's*

March 4 | 1 p.m.-2:30 p.m. (EST)

This webinar is sponsored by the Antitrust PG

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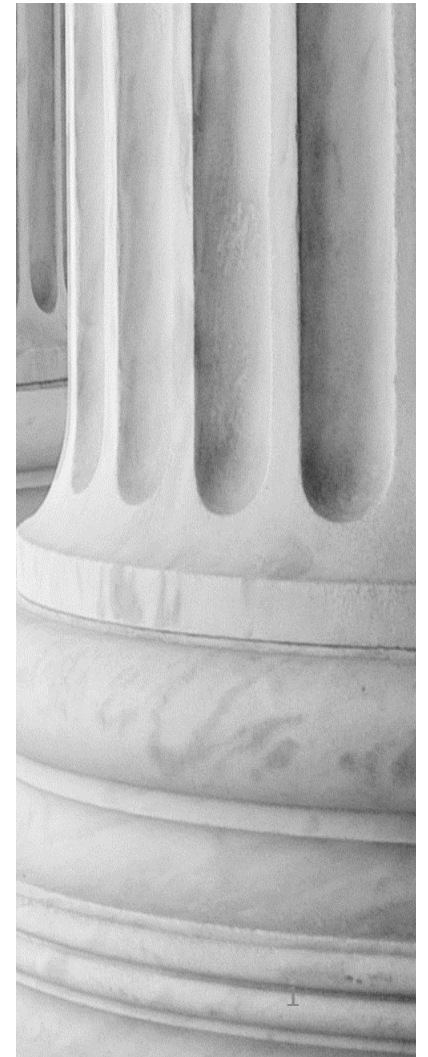
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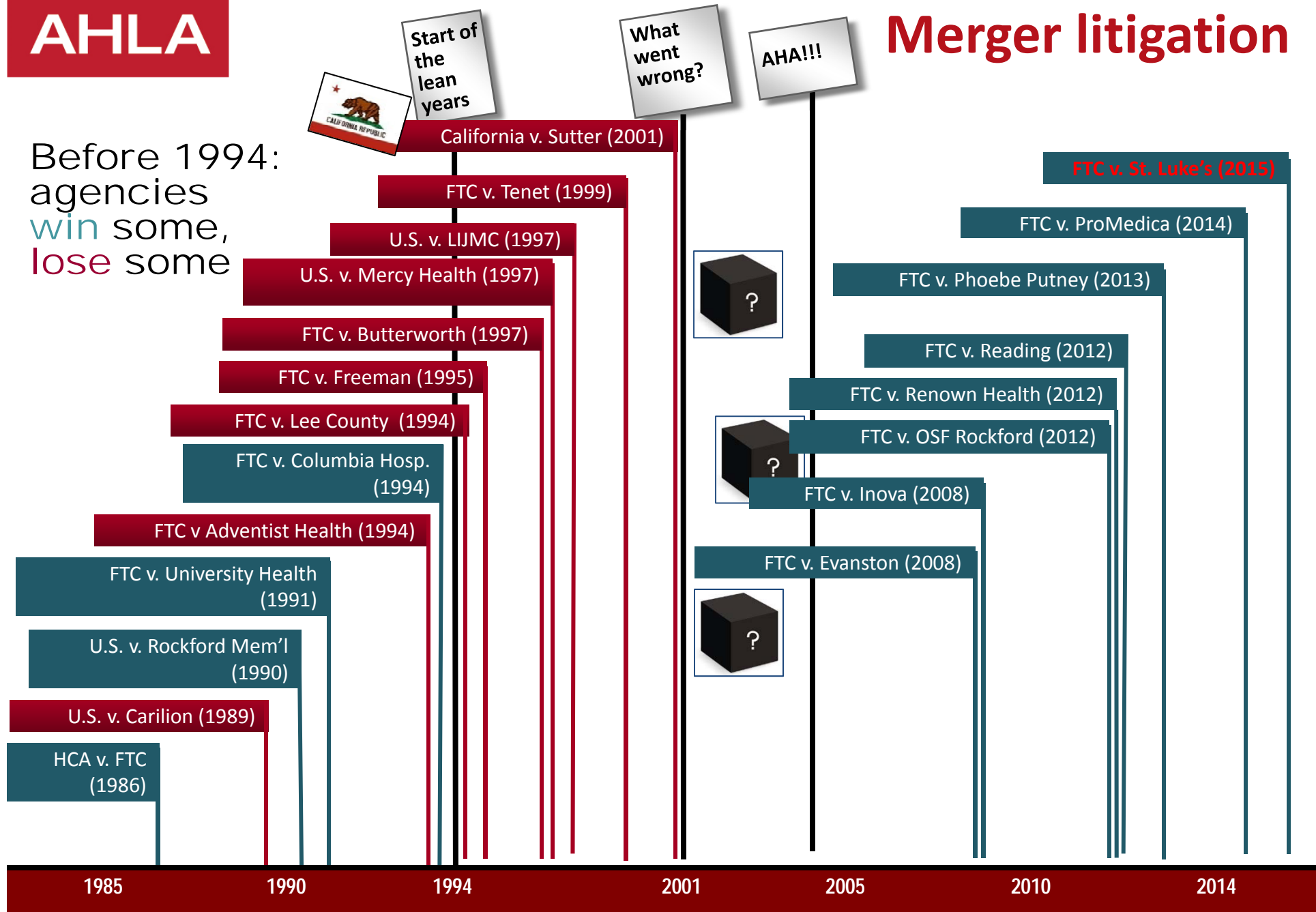
- **Background**
 - Trends in hospital and physician consolidation
 - Why are hospitals acquiring physicians?
- **Recent decisions**
 - Recent decisions: St. Luke's, Partners, ProMedica
- **Lessons learned**

Background

AHLA

Before 1994:
agencies
win some,
lose some

Merger litigation



Background: physician consolidation



Wall Street Journal

September 13, 2012

COMPETITION

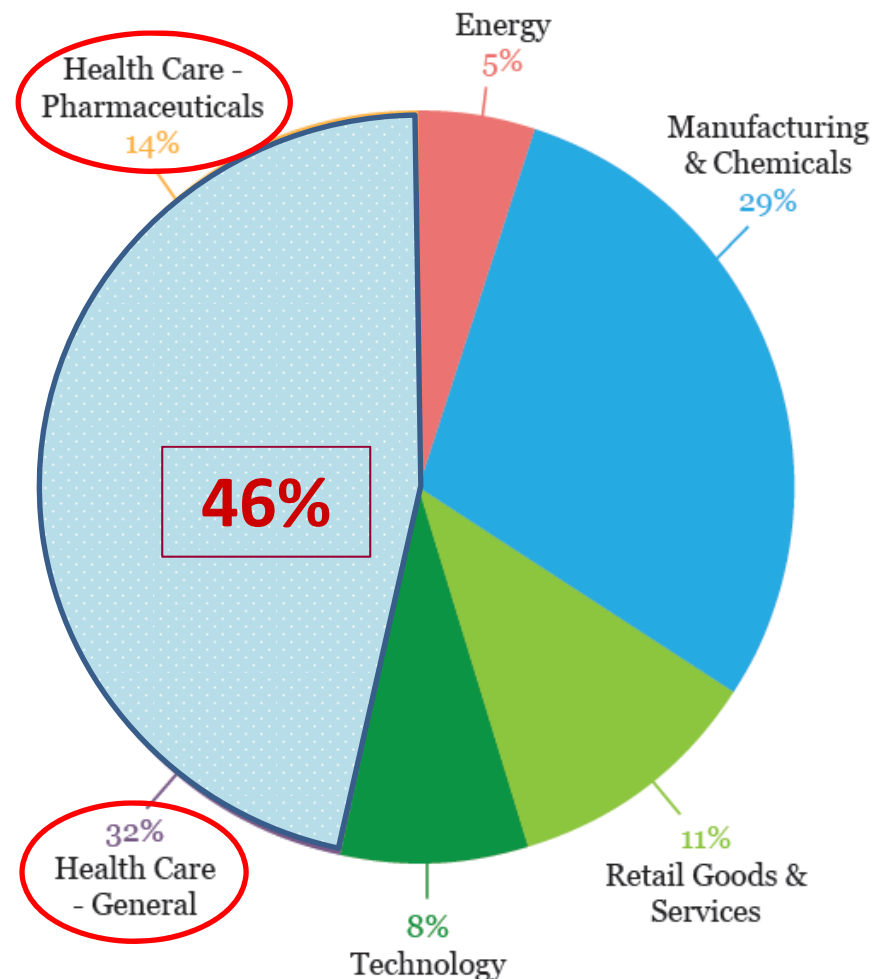
ANTITRUST ENFORCEMENT

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Enforcement Actions by Sector
Fiscal Years 2009-2013

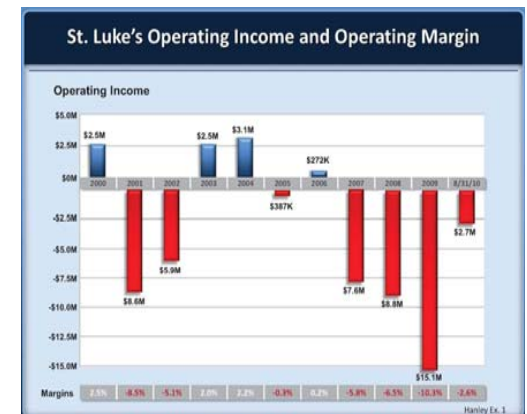


Recent Decisions

Three significant developments

- Last year:
 - Sixth Circuit rules against ProMedica merger
- January:
 - Massachusetts court rejects Partners merger
- February 10:
 - Ninth Circuit rules against St. Luke's merger

- Four systems in Toledo, Ohio
 - 4-3 merger
 - But 3-2 in OB
- High market shares
- No efficiency defense
- Claim made that St. Luke's was “flailing”



Background: Partners

- Partners HealthCare System sought to acquire South Shore Hospital and Hallmark Health, in metro Boston; investigated by the DOJ and Mass AG
- Partners and the Mass AG entered into a proposed behavioral consent
 - Component contracting + price caps + growth restrictions
 - Mass Health Policy Commission: transaction would result in higher prices
- Mass state judge established a Tunney Act “lite” process to receive public comments and hosted several lengthy hearings
- Judge rejected the proposed consent: not in public interest and not administrable
- Partners announced it has abandoned the South Shore Hospital acquisition
- Partners/Hallmark transaction pending DOJ HSR review

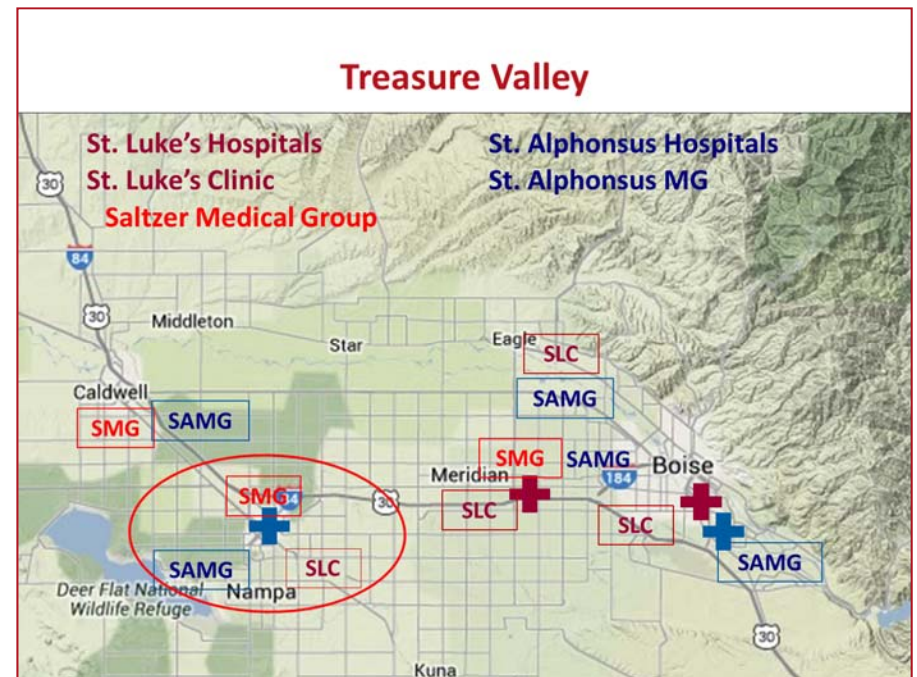
- First fully litigated FTC challenge to physician deal
- FTC scrutiny of physician deals before *St. Luke's*:
 - 2011: Providence acquisition of cardiologist groups in Spokane, WA (closing letter)
 - 2012: consent order with Renown Health, Reno, NV

History

- St. Luke's proposed acquisition of Saltzer Group
 - ~40 member, multi-specialty
- Saint Alphonsus, rival system, sued
- Acquisition closed
- FTC sued; litigations consolidated
- Trial
- Ninth Circuit decision
- St. Luke's indicated Monday may seek rehearing

Background: St. Luke's

- Nampa was the geographic market
- Large market shares for adult PCPs
- Efficiency defense rejected
- Divestiture ordered



Lessons learned

- No conflict between ACA and antitrust laws
- Focus: horizontal competition
- Narrow geographic markets
- Large market shares
- Treatment of efficiencies
- Role of competitors, state AGs
- Use of (bad) documents
- Credible evidence
- Remedy: divestiture or oversight
- Cost of litigation



No conflict between ACA and antitrust laws

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Federal Register / Vol. 76, No. 212 / Wednesday, November 2, 2011 / Rules and Regulations 6784

thereby potentially increasing provider incentives to provide care for private payers. Families of higher-paying health plans would be more likely to pay more for Medicare beneficiaries. We stated that competition in the Medicare market would replace benefits Medicare and the Shared Savings Program because it would improve the quality of care for Medicare beneficiaries and protect beneficiaries' costs. Furthermore, competition in the Shared Savings Program by itself would not be an opportunity for the program to pay for more or more ACOs in an area. We stated that the program would allow more ACOs to participate among ACOs that are currently participating. We stated that the program would encourage improvements in quality and that the program would allow more of these benefits to be realized. We stated that the program would allow patients who would be reduced or eliminated from the program if we were to allow competition in the Shared Savings Program to continue from their formation. We stated that the program would create more

ment: A significant number of members supported mandating that the AECI model be used to facilitate negotiation and coordination in all projects benefiting from the choice of providers in the districts. The committee was split 5-5.

The U.S. Secretary of Health and the Affordable Care Act authorize us either to promulgate rules governing the practice of law or to delegate it. Agencies that authorize the practice of law in the States are authorized to promulgate rules governing the practice of law. By certain AECI members cited a model that the proposed rules would be subject to the interest Agency to discontinue participating in the State and therefore the delegation doctrine. It has public policy to the interest enforcement of the interest to a regulatory requirement a mandatory review of the AECI with a 50% share of the interest for commercial services. The mandatory review shall

Policy Statement. Those ACOs would be required to submit to us, as part of their Shared Savings Program applications, a letter from the reviewing Antitrust Agency confirming that it had no present intent to challenge or recommend challenging the proposed ACO. Absent such a letter, the proposed ACO would not be eligible to participate in the Shared Savings Program.

In addition, the proposed Antitrust Policy Statement explained that ACOs that are outside the safety zone and below the 50 percent mandatory review threshold frequently may be pro-

Program would not present competitive problems that could subject them to antitrust challenges that may prevent them from completing the terms of their agreement with us. Second, it would maintain competition for the benefit of Medicare beneficiaries by reducing the potential for the creation of ACOs with market power. In this context market power refers to the ability of an ACO to reduce the quality of care furnished to Medicare beneficiaries and/or to raise prices or reduce the quality for commercial health plans and enrollees.

not its use, should be monitored because if an AGO produces an effect while maintaining quality and safety, centerpieces, market share is an appropriate measure of anticompetitive behavior.

• **Require mandatory notice:** If a PSA shares, but does not require AGOs with greater than a 50 pct PSA share to obtain a mandatory review.

Richard D. Ruckin, Don J. Korth, & Don Jones, "Delegation Dilemma: Can 10103-01 Modify AGOs to Jump Into the Competition Antitrust Agency?" 20 Health L. Rep. 11 (1991).

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 212 November 2, 2011

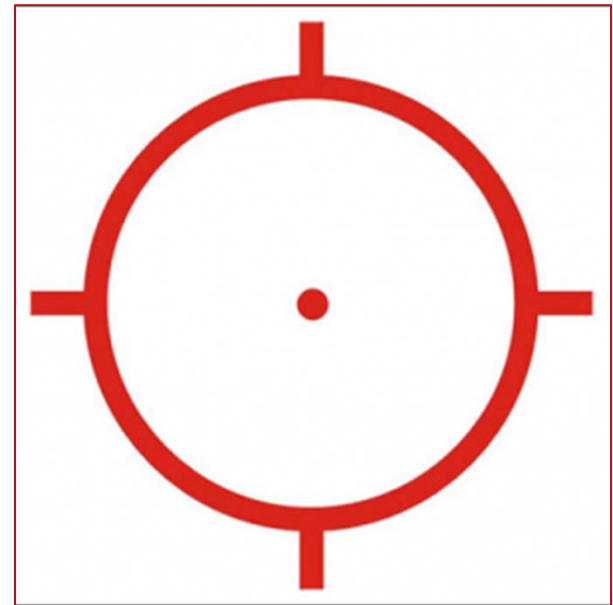
Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services
42 CFR Part 425
Medicare Program; Medicare Shared Savings Program; Accountable Care
Organizations: Final Rule

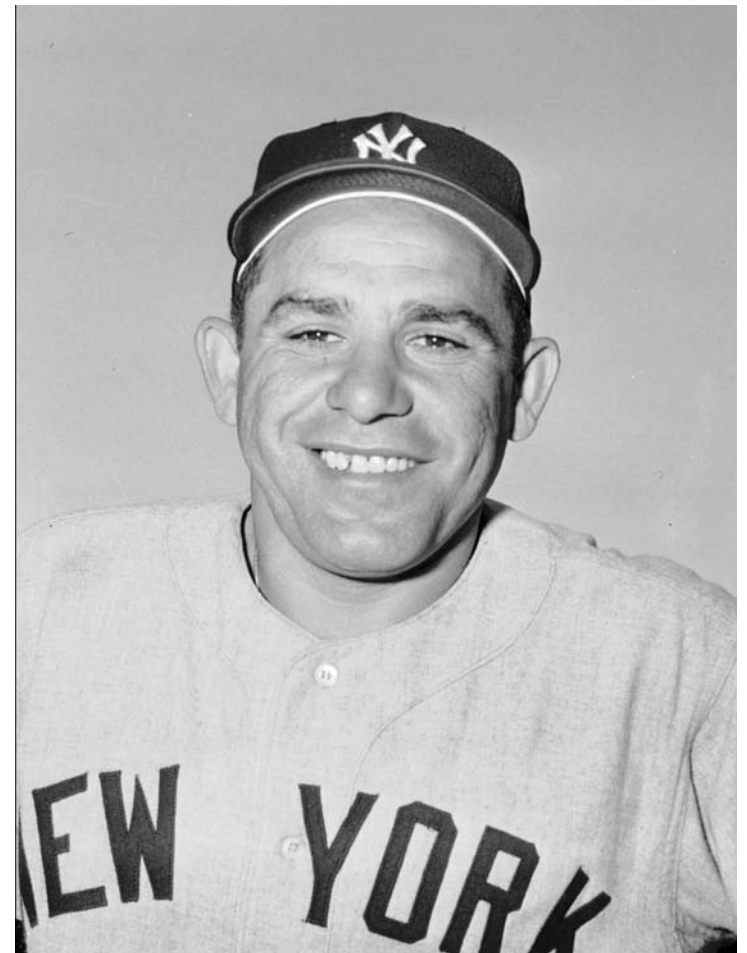
Focus: horizontal competition

- Horizontal mergers remain the target
- Adult PCPs in Nampa



“It’s tough to make predictions, especially about the future”

Saint Alphonsus and FTC v. St. Luke’s (slip op. at 11)



- St. Al's: St. Luke's PCPs won't refer to St. Al's
 - This will damage hospital competition
- District court: agreed referrals likely to change
 - But ... the court did not use this finding
- Court of Appeals
 - Concurred

“There has been a dramatic increase in vertical integration in other areas of the health care industry. For example, many hospitals and/or health plans are affiliating with medical clinics and physician practices.”

*Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (**May 1995**)*

“Provider networks are expected to achieve significant economies of scale and scope resulting in lower costs of providing care ...

“However, competitive harm may result from some types of vertical mergers.”

*Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (**May 1995**)*

“While the private plaintiffs challenged the transaction under a vertical theory ... the Commission’s challenge was based strictly on a horizontal theory. Indeed, antitrust challenges by the federal antitrust agencies based on vertical theories of harm are rare.”

*Deborah L. Feinstein, Antitrust Enforcement in Health Care:
Proscription, not Prescription, Fifth National Accountable Care
Organization Summit (June 2014)*

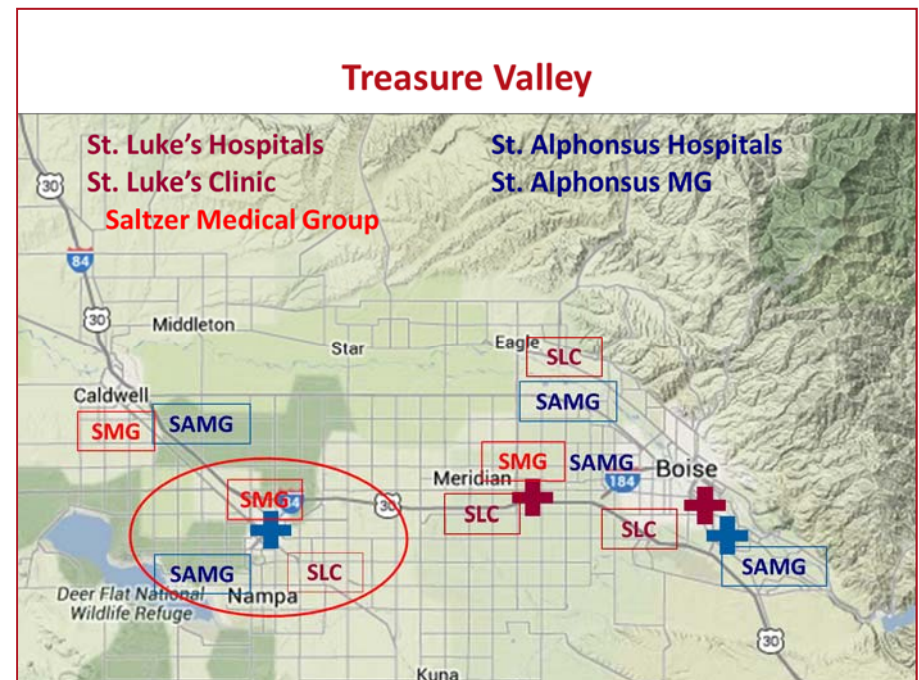
“[A] vertical provider transaction could raise concerns, e.g., if a hospital acquired so many physicians in a particular specialty that a competing hospital would be unable to provide that service because it lacks access to the needed physicians ...”

*Deborah L. Feinstein, Antitrust Enforcement in Health Care:
Proscription, not Prescription, Fifth National Accountable Care
Organization Summit (June 2014)*

Narrow geographic markets

Narrow markets

- Evidence for Nampa as geographic market
 - Residents “strongly prefer access to local PCPs”
 - Insurers need local PCPs to market plan
 - One-third saw PCPs outside Nampa
 - But those people drove east (to Boise) for work
 - Did not prove willingness to travel for others



Saltzer is Dominant in the “Nampa Market”

6



From: Castledine, Ed <castled@slhs.org>
Sent: Tuesday, June 28, 2011 5:15 PM
To: Taylor, Jeff <taylorj@slhs.org>; Roth, Chris <croth@slhs.org>
Cc: 'peterl@consiliumgroupinc.com'
Subject: stats
Attach: Nampa Physicians.xlsx

Just finished putting this together- it is rough form but wanted to get your perspective on this type of information as it relates to your meeting tomorrow. The first two tabs are what I need your opinion on. This begins to show the dominance of Saltzer in the Nampa market. I removed all of the dentists, anesthesiologists, chiropractors etc from the list and left only the actual providers. Out of roughly 80 physicians in Nampa, Saltzer represents 47. If you add the Mercy Group, we have the opportunity to work exclusively with 54 of the 80.

I will speak with Peter as well about other relevant financial data. Also, Alan Barton found that revenue associated with the Saltzer specialists in St. Luke's is a little more than \$5m annually.

Let me know what you think - Ed

mg.slhmc.org made the following annotations

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ATTORNEYS' EYES ONLY



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CX00244-001

Plaintiffs' Exhibit 1281

“This begins to show the *dominance of Saltzer in the Nampa market*. . . Out of roughly 80 physicians in Nampa, Saltzer represents 47. If you add the Mercy Group, we have the opportunity to work exclusively with 54 of the 80.”



Ed Castledine,
Director of Business
Development



TX 1281

Disparate market theories?

- Health plans market to employers who often require broad geographic coverage (certainly broader than individual patients require)
- Employers are less likely to select plans that have important “holes” in geographic coverage
 - Because of this, large hospital systems may be able attain higher prices by threatening to pull out of plan’s provider network

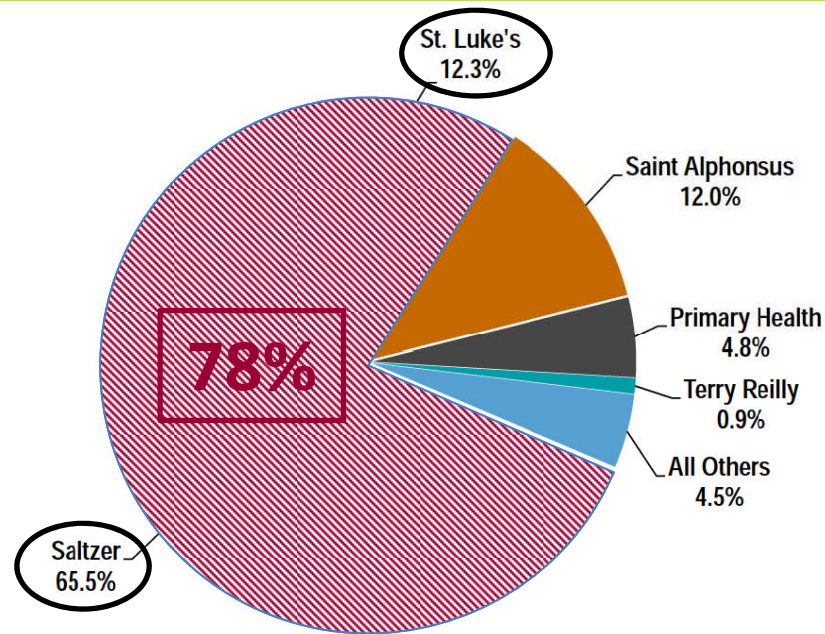


Large market shares

Large market shares

35

Market shares in the relevant market, by visits



TX 1789 (Dranove Report) Figure 18

St. Luke's and Saltzer account for nearly 80% of PCP services in Nampa

October 2, 2013

Treatment of efficiencies

- Supreme Court has never expressly approved efficiencies as rebuttal to prima facie §7 case
 - Cites to *Brown Shoe* (1962) ...
 - But, four circuits appear to accept defense
- FTC treatment of efficiencies
 - “cautiously recognized”
- No court has ever found efficiencies sufficient

- “We remain skeptical about the efficiencies defense in general and about its scope in particular”
- Here, court assumes defense, defines it narrowly:
 - Must have “evidence that the proposed merger will create a more efficient combined entity and thus increase competition”
 - “Requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive”

- Two types of efficiencies
 - Lower costs, e.g.:
 - Economies of scale
 - Risk based contracting leading to lower medical utilization
 - Better network management (e.g. redirection of care from academic hospitals to community hospitals)
 - Improved quality of care, e.g.:
 - Integrated care
 - Better population health management
- Who benefits from lower costs?
 - Not enough to lower costs for the providers
 - Require pass through to consumers (patients, employers, payers)
- Key questions for antitrust
 - Do efficiencies offset antitrust risk?

Efficiencies: Snapshot of the arguments and evidence in St. Luke's

St. Luke's

- Risk based contracting
 - Berkeley Report on the benefits of fully integrated delivery systems, including the ability to offer risk based contracting
 - Examples of the Kaiser Permanente and Cleveland Clinic integrated models
- Benefits of EMR interoperability
 - Could not move Saltzer physicians to EPIC without employment

Plaintiffs

- Integrated care and risk based contracting do not require a large number of physicians
 - E.g. In Idaho, independent physician groups are successfully using risk based contracting
 - Description of VA hospital system
- EMR interoperability is essential, but acquisition is not necessary to achieve desired outcome
 - E.g., St. Luke's Affiliate program

Disagreement was over whether the efficiencies were merger-specific.



Role of competitors, state AGs

- Competitors can use antitrust for offensive purposes
 - In Partners, four competitor physician/hospital entities sought to intervene in consent decree proceeding – technical intervention was denied but Judge instituted public comment window at suggestion of the competitors, which provided basis for her rejection of the consent
 - In St. Luke's, initial complaint was filed by competitors and likely laid a fertile ground for later FTC and AG involvement
- State AGs will continue to be intimately involved in all matters of healthcare
 - Touches all constituencies – easy way to pick up political capital
 - Local flavor of these disputes means local knowledge is essential
 - Joint investigations with federal agencies common but states may also choose to pursue their own efforts without federal involvement

Use of documents

St. Luke's Strategy of Employing Physicians Is About "Achieving Better Profit"



From: Taylor, Jeff <taylor@slhs.org>
Sent: Wednesday, September 19, 2012 9:35 AM
To: Ken, John <kajo@slhs.org>
Subject: Fwd: Two out of Three

Better cost is a worthy goal and I totally back that. I also understand market forces involved. But- let's be realistic. Employing physicians is not achieving better cost, it's achieving better profit.

Better cost is a worthy goal and I totally back that. I also understand market forces involved. But- let's be realistic. Employing physicians is not achieving better cost, it's achieving better profit.

expectations. I intended for my response to communicate that I do have concerns that our strategy to become an aligned system may be offensive to some and go against the general independent nature of certain physicians. To the extent this strategy forces some to pursue alternative strategies, this can impact our financial performance. My comment was not intended to pass judgement on that position, just indicate the financial risk.

Regarding the issue of cost and "achieving more profit", this requires more discussion and analysis. Aggregating pieces and parts of a fragmented environment in an attempt to create an aligned system will undoubtedly highlight examples as you describe. The question and challenge ahead of us is whether the combined system will lead to a lower cost for the combined population, with all parts playing a role (eg payers, hospitals, physicians etc.).

I agree with your comment that added transparency regarding provider based billing

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Plaintiffs' Exhibit

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received this message by error, please notify us immediately.

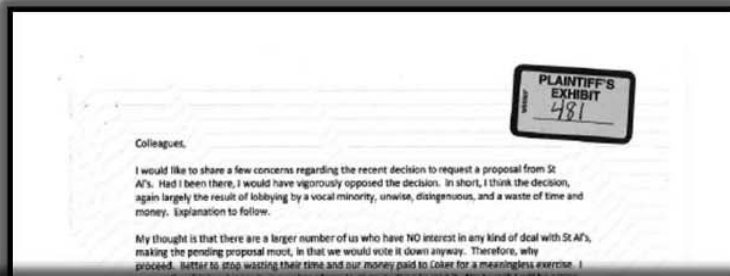
the related message."

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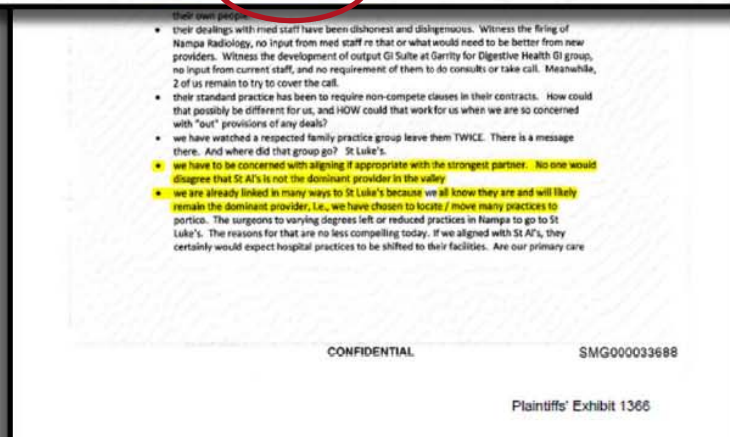
**Dr. Thomas Huntington, St. Luke's
Treasure Valley Board Member**



St. Luke's is a "Dominant" Healthcare Provider



- we have to be concerned with aligning if appropriate with the strongest partner. No one would disagree that St. Luke's is not the dominant provider in the valley
- we are already linked in many ways to St. Luke's because we all know they are and will likely remain the dominant provider, i.e., we have chosen to locate / move many practices to



Dr. Randell Page,
Saltzer's Contracts
Committee Chair





St. Luke's Expects Market Share in PCPs to Provide a "Strong Position" with Insurers

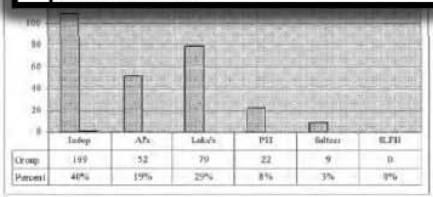
Primary Care Physician Market Share

St. Luke's Treasure Valley recognizes that market share in primary care is a key success factor, critical to sustaining a strong position relative to payer contracting and supporting ancillary, procedural, inpatient, specialty and other services. For purposes of this analysis, primary care is defined as family medicine, internal medicine, OB/GYN and pediatrics.

Primary Care Physician Market Share

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St. Luke's has a history of being a risk partner in the market.



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SLHS000039821

Record evidence confirms that the acquisition will likely result in anticompetitive effects

- Dr. Randell Page, Chair of Saltzer's Contracting Committee, wrote:
 - If Saltzer closed its pending deal with St. Luke's, it may be able to re-open contract negotiations with Blue Cross, "as there would be the **clout** of the entire network"

ATTORNEYS' EYES ONLY

TX 1361 (SMG000315458) at 458.

ATTORNEYS' EYES ONLY

October 2, 2013

What Does the Acquisition Change?



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

PX1144 003

CONFIDENTIAL

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 - Invest here. 	<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

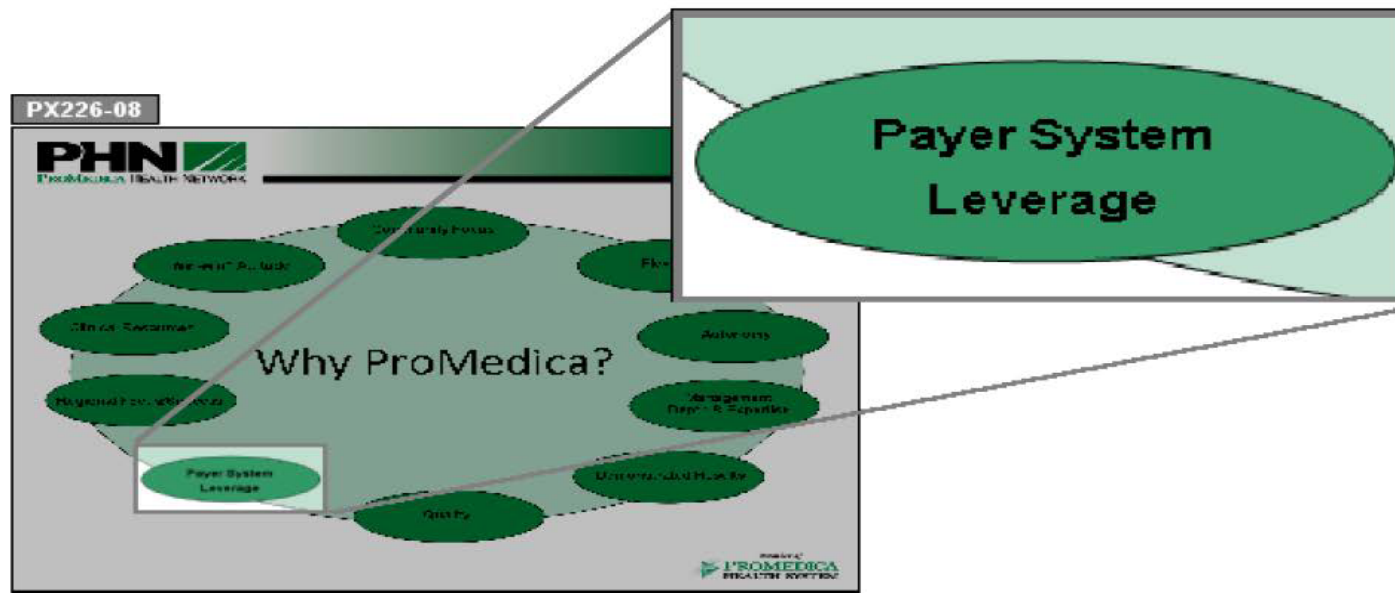
SLH06/7/37

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.

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)

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.*”

... 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.”

Credible evidence

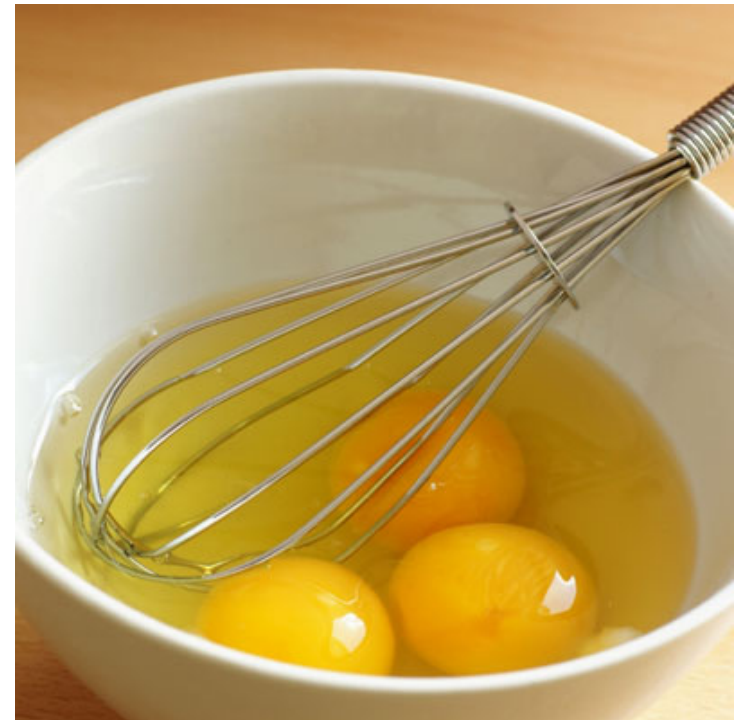
- Actual evidence *as opposed* to “trust” me arguments
- Quality documents describing deal rationale:
 - Discuss purported efficiencies
 - Consistency across documents
 - Prepared before antitrust strategy to clear deal
 - Explain why efficiencies are merger-specific

- Evidence from prior transactions
 - E.g. analysis showing prior increases in scale allowed the firm to lower unit (or marginal) costs
 - E.g. analysis showing transaction allowed parties to “keep care local”
- Analysis of production technology
- Analysis showing potential for network re-optimization
- Simulations showing the magnitude of cost savings required to offset any competitive concerns
- Testimony of business people/clinicians

Remedy: divestiture or oversight

*ProMedica, Partners,
and now St. Luke's:*

- Structural remedies
far preferred over
conduct remedies
- Unscramble the eggs?
 - Fine!



Cost of litigation

[Business](#) > [The Business of Idaho Health Care](#)

St. Luke's sues its insurance company to recover legal costs

BY AUDREY DUTTON

[adutton@idahostatesman.com](#) November 6, 2014 Updated 4 hours ago

St. Luke's Health System filed a lawsuit Tuesday against its insurance company, alleging breach of contract when the insurer stopped reimbursing St. Luke's for legal costs stemming from a 2013 federal antitrust lawsuit.

The Boise health system told the Idaho Statesman last month that its unreimbursed bills so far total \$8.1 million.



“The Boise health system told the Idaho Statesman last month that its unreimbursed bills so far total \$8.1 million.”

Assurance Co. and Darwin National Assurance Co. — which the lawsuit calls “Allied” collectively — says the insurer paid St. Luke's for legal costs through November



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