

ISSUES IN LITIGATING HOSPITAL MERGERS

*Presentation to FTC/DOJ Hearings on Health
Care and Competition Law and Policy*

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Presentation overview

- **Background, biases and caveats**
- **What explains the government losing streak?**
- **What should the enforcers do? – Some modest suggestions**



What explains the government losing streak?

- **Cases raise extremely difficult “traditional” antitrust issues**
- **“Litigation risk” increased by several factors**
 - **Non-profit status overlay**
 - **Underlying skepticism about antitrust and health care**
 - **“Home court” disadvantage**



Difficult “traditional” antitrust issues



Geographic market

- **Catch-22 of “dynamic analysis”**
 - “Hard facts,” such as patient flow data, reflect only historical evidence
 - Future-oriented look tends to be speculative and anecdotal
- **Rigid application of E-H tests**
- **Critical loss analysis usually suggests very broad markets**



Product market

- **Competition at the “low end” from freestanding centers and doctors’ offices**
- **Competition at the “high end” from regional referral centers**
- **Single specialty hospitals**
- **“Anchor” hospitals**



Competitive effects

- **At issue (subject to price competition) is only a small minority of hospital patients**
- **Role of health plans, employers and consumers complicates the competitive story**
- **Analysis tends to ignore much of the focus of hospital competition, which is on doctors, quality, and expanding scope of services and technology**
- **Hospitals' pledge to limit price increases can dull apparent need for enforcement action**



Efficiencies

- **Widespread perception that consolidation could address inefficiencies and overbedding**
- **The “Medical Arms” race**



Increased “litigation risk”



Non-profit status

- **Perception that nonprofits act differently**
- **Nonprofit hospitals often are highly-regarded locally**
- **Some empirical research suggests nonprofits behave differently than for-profits**
- **Not all nonprofits are alike**



Skepticism about antitrust and health care

- **Common belief that health care is “different”**
- **Locally controlled non-profits, in particular, are perceived to be different**
- **Skepticism that competition in health care will necessarily result in best quality/price for consumers**
- **“Managed care backlash” against likely complainants (health plans)**



Home court disadvantage

- **Unlike with most merger challenges**
 - Typical hospital PI case will be tried in the backyard of the merging parties
 - Judge is likely to have first-hand experience with product at issue, and may have high regard for local community hospitals
- **Local judges typically have little experience with merger law or sophisticated antitrust/economic analysis**



What should the enforcers do?

Eleven modest suggestions.



1. Do not abandon the field

- **In the absence of state regulation, competitive markets are essential**
- **State enforcers and private litigation cannot fill the void**
- **Vigilant enforcement – even with relatively few cases – can provide an important sentinel effect**



2. Do not underestimate complexities to be analyzed

- **Extremely challenging to**
 - **Identify potential “problems”**
 - **Identify cases that the enforcers can win**
- **Staff and management must keep current on developments in the industry**
- **Staff and management must push hard on theories and evidence**
- **Do not try to fight the “last war”**



3. Build – and retain – relevant agency expertise

- **Among lawyers**
- **Among economists**
- **Outside consultants**



4. Increase communication with health plans and employers

- **Key to identifying problem areas**
- **Key to developing crucial evidence**



5. Increase communications with the hospital community

- **Crucial to fully understanding hospital competition**
- **Important to explain agency mission**



6. Increase communications with other government entities

- **These include payers**
 - Medicare; Medicaid and other government payers
 - They play key roles in hospital behavior
 - Changes in government policy may affect importance of competitive markets
- **Agency for Health Research and Quality**
- **Also important for FTC and DOJ to coordinate with each other**



7. Continue research agenda

- **Vital to both understanding – and explaining competition issues and possible enforcement actions**
- **Collaborate with health service researchers**
- **Issues include**
 - **Market definition**
 - **Characteristics of nonprofits**
 - **Nature of hospital competition**
 - **Ability to achieve efficiencies**
- **FTC/DOJ Hearings are an excellent start**



8. Take into account non-price issues

- **Quality competition**
- **Competition for physicians**
- **Competition involving new technology and expanded services**



9. Work with state enforcers

- **Local authorities have “ear to the ground”**
- **Federal enforcers**
 - **Will almost certainly lose if opposed by state AG**
 - **Will be substantially strengthened by state AG support**



10. Continue hospital merger retrospective

- **Could be very informative, if**
 - **done in a methodologically sound way**
 - **results are publicly available**
- **Could lead to more informed government actions**
- **Could help provide guidance to private industry and practitioners**



11. Choose battles *very* carefully

