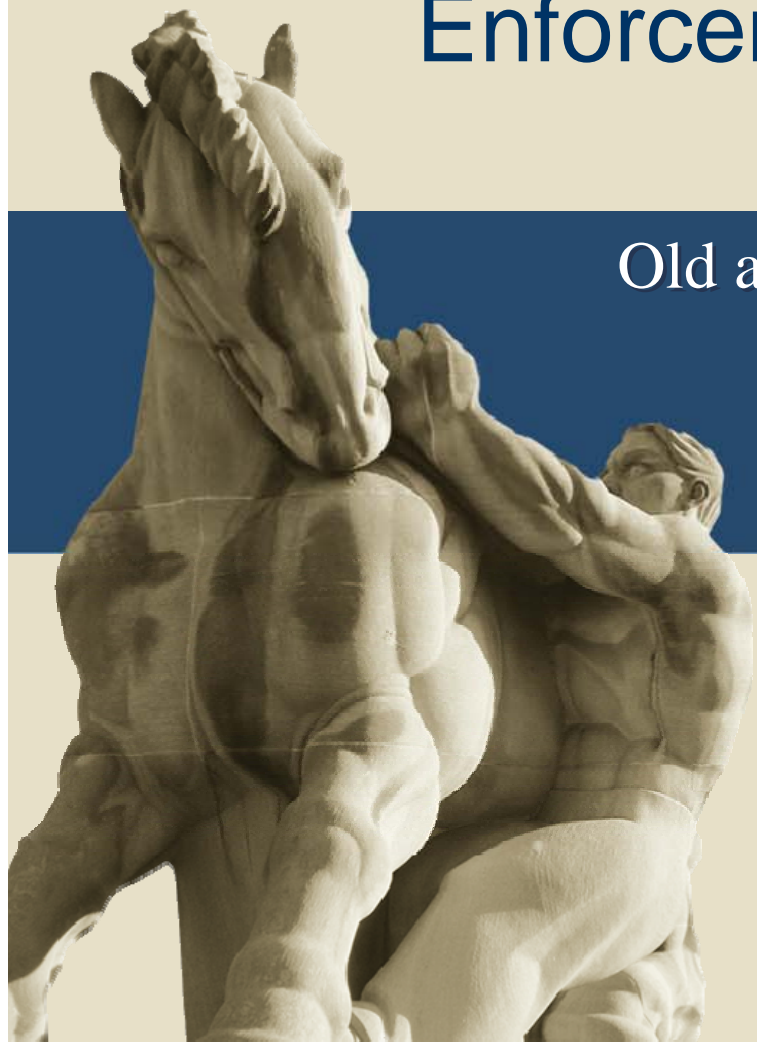


Hospital Merger Enforcement in the United States

Old and New Forms of Hospital Competition: Economic and Antitrust Issues

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The views in this presentation do not necessarily represent the views of the FTC or any individual Commissioner.



Hospital Merger Enforcement at the FTC

- FTC will continue to diligently investigate proposed transactions and challenge those mergers that are likely anticompetitive
- We also recognize that the vast majority of proposed hospital mergers will not result in competitive harm and may result in significant efficiencies
- Demonstrating that improvements in quality of care are a likely outcome of the merger will be given substantial weight

Hospital Merger Enforcement Background



- Success in 1980s in administrative litigation (Part III)
 - American Medical International (1984)
 - HCA (1985) – affirmed by 7th Cir., cert. denied
- Success in federal court (Preliminary Injunction)
 - U.S. v. Rockford (N.D. Ill. 1989), affirmed by 7th Cir., cert. denied
 - FTC v. University Health (11th Cir. 1991)
 - Non-profit hospitals subject to antitrust laws
- String of losses from mid-1990s through 2001
 - Mainly because of judicial acceptance of large geographic markets

Hospital Merger Enforcement Background



- 2002: Chairman Muris – merger litigation task force and retrospective study of consummated mergers
 - Evanston: consummated merger, complaint filed in 2004
 - *Evidence of post-merger behavior available. Different than most prospective merger investigations (like Inova) which rely upon predictive model*
- 2004: DOJ/FTC Health Care Report
 - Analysis should not be affected by hospital's institutional status (non-profit vs. for-profit)
 - Merger Guidelines analysis (relevant markets, defenses)
 - Types of evidence in all merger cases (e.g., strategic planning docs, customer [MCOs/employers] testimony) should be used by fact finder to help delineate relevant markets

More Recent Developments

- Inova/Prince William:
 - Pre-consummation in both federal court and administrative litigation
 - Hospital system purchasing an independent hospital
 - Parties abandoned transaction in the middle of these litigations
- Evanston/Highland Park:
 - Post-consummation challenge
 - Evidence of significant price increases
 - Efficiencies did not outweigh harm

Definition of Relevant Product Market

- General Acute Care Inpatient Hospital Services for Commercially Insured Patients
 - Cluster market
 - Widely recognized by courts
 - Outpatient/tertiary??

Geographic Market

- Defining the correct (or defensible) parameters of geographic market
 - An historical area of weakness for the agencies
 - Testimony/documents from health plans, parties, other hospitals, and employers
 - Inflow/Outflow analysis (not Elzinga-Hogarty)
 - Econometric work??
- Steering of patients (expand the geographic market?)
 - Will the presence of steering strengthen the competitive effects story by potentially disciplining “must-haves?”
- Direct evidence of competitive effects to “back into” geographic market

Theories of Competitive Harm

- Traditional Unilateral Effects
 - A-side and B-side close competitors in large surrounding area
 - Next best substitutes based on draw data?
- Merger will strengthen combined hospitals bargaining strength against health plans
- Can one hospital constrain a must-have??
 - Disagreement Points
- Non-price Competition

Competitive Effects Evidence

- B-side significantly lower in price
 - One Contract Pricing (Admission of Price Increase)??
 - Must be tied to unilateral effects story
- Health Plans
- Third Party Hospitals
- Expert Testimony
- Documents of Parties and other market participants

Story of Competitive Harm

- Why does competition matter?
- Does a price increase by non profit hospitals really matter?
 - “Populist” Story to deal with sentiment in Butterworth

Other Challenging Issues

- State or local government
- Community reaction to the merger?
 - Key to the Populist Message
- Non-Profit Issue (Butterworth)
 - Other non-profit hospitals
 - Lack of Board involvement in health plan contracts
 - Negative option: no documents “you got too much”
 - Financial incentives for contract negotiators
 - Behavior that demonstrates profit-maximizing

Quality of Care Claims

- Acquired hospital will obtain acquiring hospital's expertise
 - A-side is better than B-side.
 - This is due to superior knowledge and/or practices.
 - After the merger, this will rub off on A-side.
- A-side would invest a bunch of money at B-side.
 - The money would not be invested without the merger.
 - The money will be spent on things that will improve quality (e.g., bed tower with private rooms, state-of-the-art cath labs).

Other Possible Efficiencies

- Merger will save a failing or flailing hospital
- New services
- Better amenities
- Cost savings/avoidance of duplicative spending