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How to Turn a Losing Streak into Wins: The FTC and Hospital Merger Enforcement

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FROM THE MID-1990s TO THE EARLY 2000s, the Federal Trade Commission lost a string of hospital merger cases. (See chart at page 33.) During this time period, federal courts throughout the United States repeatedly rejected FTC attempts to block hospital mergers.[1]

For example, twice during the 1990s, the Eighth Circuit denied FTC challenges on grounds that the FTC had failed to meet its burden of establishing the relevant geographic market because the FTC's alleged geographic markets were too narrow.[2] In the latter of the two cases, *FTC v. Tenet Health Care Corp.*, the Eighth Circuit went so far as to characterize the FTC's narrow geographic market definition and the resulting high market share assigned to the merging hospitals as "contrived" and "absurd."[3] Even in cases where the FTC successfully established a relevant geographic market, the FTC still lost.[4] In *FTC v. Butterworth Health Corp.*, for example, the district court denied the FTC's motion for preliminary injunction because, in part, the FTC "ultimately failed to show . . . that [the merged entity's] market power [would be] likely to be exercised to the detriment of the true consumers of these health care services."[5]

By the early 2000s, FTC Commissioners were publicly discussing the agency's losing streak and acknowledging that "the template for trying hospital merger cases that was used with great success in the 1980s and early 1990s no longer works."[6] As a result of these discussions, in 2002, under the leadership of then-Chairman Timothy J. Muris, the FTC established a new merger litigation task force to help select the best cases to bring. The FTC also launched a retrospective study of consummated hospital mergers in several cities to "obtain useful real-world information, [that would allow] the Commission to update its prior assumptions about the consequences of particular transactions and the nature of competitive forces in health care."[7] The study provided the FTC with evidence of actual anticompetitive effects and led to the FTC's 2004 challenge in *Evanston*—the FTC's first victory in a hospital merger in well over a decade.[8]

Since *Evanston*, the FTC has been on a winning streak that includes three successfully litigated merger challenges and at least four hospital acquisitions where the parties either abandoned or settled after the FTC challenged the deal or threatened a challenge.[9] Most significant in this string of successes was the FTC's abandonment of the Elzinga-Hogarty test to define the relevant geographic market based on patient inflow and outflow data. Instead, the agency now demonstrates competitive harm by showing that the proposed acquisition eliminates the ability of health insurance companies to exclude the acquisition target hospitals from their provider networks. This increases the merged hospitals' bargaining leverage in contract negotiations for their services, which ultimately leads to higher prices.[10]

This article begins with a discussion of *Evanston* and how it laid the groundwork for future FTC victories in the hospital merger and physician group acquisition areas. It then describes the FTC's string of successful post-Evanston challenges, highlights their significance, and posits a theory as to what has changed in FTC enforcement, as well as what is yet to come.

Evanston

In 2000, Evanston Northwestern Healthcare Corp. (ENH) acquired Highland Park Hospital. The acquisition combined ENH's Evanston and Glenbrook Hospitals with Highland Park Hospital, the nearest hospital to the north. The three hospitals are located in an affluent Chicago suburb and form a geographic triangle, with Lake Michigan on its eastern border. At the time of the merger, the FTC reviewed the proposed acquisition pursuant to the Hart-Scott-Rodino Act and allowed it to proceed.

However, in February 2004, following the FTC's retrospective study of consummated hospital mergers, the FTC issued an administrative complaint seeking to "unwind" the acquisition and alleging that, as a result of the acquisition, ENH was able to raise the prices it charged to health insurers far above the price increases of other comparable hospitals.[11] In October 2005, the Administrative Law Judge sided

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with the FTC and ordered the divestiture of Highland Park Hospital.[12] ENH appealed this decision to the Commission.[13]

In August 2007, the Commission unanimously affirmed the Administrative Law Judge's decision. The Commission held that the merger enabled ENH to exercise market power in the traditional market for "general acute care hospital services" and thereby raise prices to supracompetitive levels. According to the Commission, post-merger price increases demonstrated that ENH had market power as a result of the acquisition, and that the relevant geographic market in which to analyze the transaction was the geographic triangle formed by the three ENH hospitals.[14]

Actual Competitive Effects Equals Relevant Geographic Market. In addition to ending the FTC's losing streak, *Evanston* is significant because it announced the Commission's thorough rejection of its prior approach to geographic market definition, a critical and typically dispositive aspect of hospital merger challenges.[15] Traditionally, the agency relied on empirical and quantitative evidence of where patients could turn in the event of a hospital's anticompetitive price increase.[16] Such empirical evidence included patient origin and flow data, which was used to show where the patients lived and how far they travelled for health care services. The Elzinga-Hogarty test was applied to patient flow data to determine the boundaries of the geographic market based on whether patients moved into or outside of a geographic market to obtain hospital services.[17]

In *Evanston*, the Commission left all that precedent on the cutting room floor and instead used a streamlined approach to geographic market definition. It cited post-merger price increases as evidence of actual competitive effects, demonstrating a relevant geographic market comprised of the area "directly proximate to the three ENH hospitals." In so doing, it rejected the Administrative Law Judge's finding that the geographic market included four other nearby hospitals that would have the ability to constrain ENH hospital pricing.[18]

The FTC's Silver Bullet: Redefining Hospital Market Power. Commissioner J. Thomas Rosch's concurring opinion in *Evanston*, with its focus on the merged entity's increased bargaining leverage with health plans, was equally, if not more important, as the Commission's opinion. In holding that the merger enabled ENH to raise prices above competitive levels, the Commission found that the merged hospitals were each other's closest substitutes. Commissioner Rosch's concurring opinion, however, framed the issue differently: he viewed the merged hospitals as competing with each other not only as individual hospitals but also in the sense that "MCOs [managed care organizations] wanting to compete effectively for insureds located within the geographic triangle bounded by the three ENH hospitals viewed Evanston and Highland Park as each other's 'next best substitute' in forming networks for that purpose."[19] He thus argued that the merger's primary effect "was to eliminate competition between Evanston and Highland Park for inclusion in MCO hospital networks."[20] This theory of anticompetitive effects—that hospitals may be able to exercise market power through their increased leverage in negotiating with health plans—has since defined the FTC's approach to litigating subsequent hospital merger challenges.

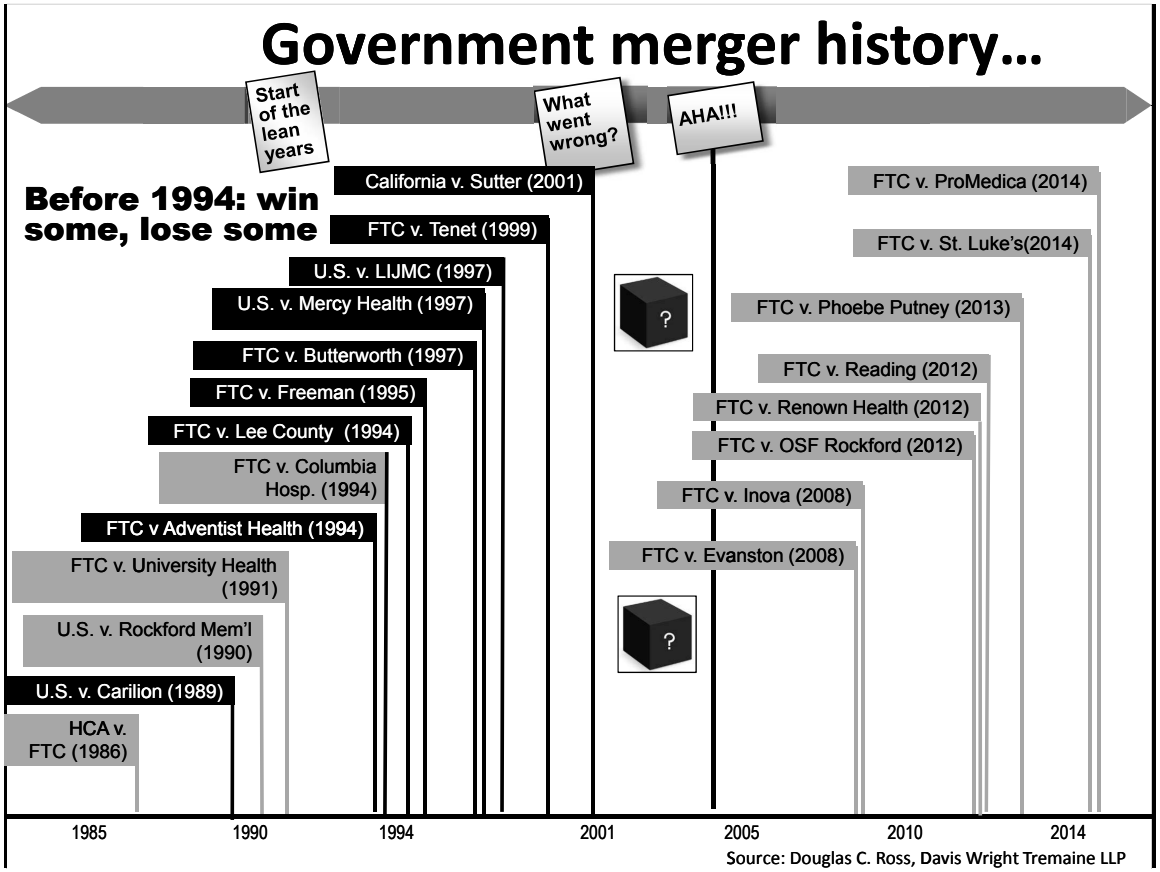
Hospital Merger Cases Since *Evanston*

Since its victory in 2007, the FTC has successfully challenged a string of proposed hospital mergers by employing the strategies adopted in *Evanston*.

Inova. The first such victory came just one year after *Evanston* in 2008, when the FTC successfully challenged a proposed acquisition by Inova Health System Foundation (Inova) of Prince William Health System, Inc. (PWHS).[21] Inova, the largest hospital system in Northern Virginia, consisted of five hospitals across Fairfax and Loudon Counties, while PWHS operated one hospital in adjacent Prince William County. The hospitals signed an acquisition agreement in August 2006 but had not consummated the transaction when the FTC challenged it in May 2008.[22]

On May 12, 2008, the FTC sought a preliminary injunction to halt the merger until the conclusion of an administrative hearing and appeal process at the FTC on the antitrust merits. The FTC had initiated the administrative proceeding just days earlier when it issued a complaint charging that the merger would likely lead to higher prices and reduced quality in the Northern Virginia market for general acute-care inpatient services. According to the FTC, after the merger, Inova would control approximately 73 percent of the licensed beds in Northern Virginia and six hospitals, and only four independent hospitals would remain. As Commissioner Rosch's concurring opinion in *Evanston* portended, the FTC alleged that Inova and PWHS were close competitors in Northern Virginia for the provision of general acute-care inpatient services and that this close competition enabled health plans to negotiate to keep health care prices down, most significantly at PWHS. The merger would have eliminated this competitive constraint and potential independent hospital alternative for health plans, leading to price increases at PWHS and Inova.[23]

Just four weeks after the FTC initiated the lawsuit, and prior to a decision on the preliminary injunction, Inova and PWHS terminated their merger agreement. In a press release,



the hospitals attributed this decision to the "unusual process changes by the [FTC that] threatened to prolong completion of the merger by as much as two years, which both health systems believe[d] was not in the best interest of the communities they serve."[24]

Changing the Litigation Model. *Inova* marked a dramatic and unusual departure from the FTC's procedural approach to merger challenges, and involved changes that significantly undermine merging parties' incentives and willingness to litigate against the FTC, regardless of the strength of the parties' case.[25] Most notable was the FTC's announcement at the commencement of its administrative proceeding against the hospitals that regardless of the outcome of the preliminary injunction proceeding in federal court, the FTC would proceed with the administrative case. This represented a 180-degree flip on more than a decade of prior policy and practice at the FTC, where if the FTC lost in the district court preliminary injunction action, it typically terminated the administrative case. As one comment noted, this policy change seemed "designed to enhance FTC adjudicative influence in merger antitrust litigation by sending the message that the case would go forward no matter what happened in district court."[26]

Since *Inova*, although the FTC has refrained from announcing that it will proceed with its administrative cases at all costs, the agency has continued to file administrative complaints and motions for preliminary injunctions simultaneously. Although this is not an FTC strategy that began with *Inova*, nor is it exclusive to hospital mergers, it is unique to the FTC (as compared to the Department of Justice) and has become a hallmark of FTC success in hospital merger enforcement.[27] The FTC has successfully utilized this procedural approach in each of its hospital merger cases since *Evanston*.

Rockford Health System. The FTC scored another victory in April 2012 when the U.S. District Court for the Northern District of Illinois granted the FTC's request for a preliminary injunction blocking OSF Healthcare System from completing its proposed acquisition of Rockford Health System.[28] OSF owned six acute-care hospitals in Illinois, including a hospital in Rockford, Illinois, which was where Rockford's only hospital was located. Both hospitals also employed physician groups located in the Rockford region.

OSF agreed to acquire Rockford in January 2011 but, in November 2011, the FTC challenged the proposed acquisition charging that it would substantially reduce competition

among hospitals and primary care physicians in Rockford, Illinois. Consistent with its usual procedure, the FTC filed an administrative complaint and sought a preliminary injunction in federal district court. The FTC specifically identified two problematic markets in the Rockford area. The first was general acute-care inpatient services, where the FTC alleged a merger to duopoly in which OSF would control 64 percent of the market and face only one competitor. The second was primary care physician services, where the acquisition would combine two of the three largest physician groups and give OSF control of over 37 percent of the market.[29]

In granting a preliminary injunction, the district court agreed with the FTC in holding that the agency met its burden by establishing that the transaction would result in a highly concentrated market for general acute-care services (GAC), in which OSF's pricing would not be sufficiently constrained by other hospitals. However, the court indicated that the FTC's case regarding the market for primary care physician services was weaker because of the lower combined market shares and because "the market [was] not subject to the same prohibitive barriers to entry that exist[ed] in the GAC market, and the bargaining leverage held by large insurance companies with respect to physician contracting [was] different than what would [have] exist[ed] in contracting for GAC services if the merger [had taken] place."[30] Nevertheless, OSF and Rockford abandoned the transaction shortly after the preliminary injunction was issued.[31]

Notably, in determining the relevant market and competitive effects, once again the Commission and the court focused on the bargaining dynamics that would exist between the hospitals and managed care organizations.

Reading Health System. Later in 2012, the FTC again successfully challenged a hospital merger, this time without a district court ruling. In November 2012, the FTC moved to block Reading Health System's proposed acquisition of the Surgical Institute of Reading L.P. (SIR)—an acquisition that the merger partners agreed to in May 2012. Reading Health was located in Berks County, Pennsylvania, and consisted of Reading Hospital, which provided general acute-care services, as well as accompanying teaching facilities in West Reading, Pennsylvania. SIR was a physician-owned surgical specialty hospital located in Wyomissing, Pennsylvania, within Berks County. It had 15 licensed beds and provided a range of inpatient and outpatient surgical services, including ENT, orthopedic, spine, and general surgical services.[32]

The FTC's administrative complaint alleged that the acquisition would reduce competition in four markets where Reading Health and SIR competed. In each market, the proposed deal would have reduced the number of competitors from 3-to-2 or 4-to-3, and resulted in Reading Health/SIR combined market shares ranging from 49 percent to 71 percent. The specific markets cited by the FTC were: inpatient orthopedic/spine surgical services; outpatient orthopedic/spine services; outpatient ENT surgical services; and outpatient general surgical services. This identification of four separate and highly specialized markets departed from the FTC's long-standing approach to product market definition, which had its origin in cases from the 1980s, in which it defined the relevant product market as a bundle of "general acute-care inpatient services."[33] And while the merging hospitals did overlap in these services, as one comment pointed out, "[T]he overlaps comprised just a small subset of the full range of services provided by the acquirer (Reading Hospital) and fewer than all the services provided by the seller (Surgical Institute)."[34]

In line with its other successes, the FTC further alleged that the proposed deal would have increased Reading Health's already significant negotiating leverage with commercial health plans, enabling it to raise the reimbursement rates that health plans pay to it for services.[35] Just one month after the FTC filed its complaint, Reading Health and SIR abandoned the transaction.[36]

ProMedica. While *Rockford* and *Reading Health* were proceeding, the FTC was also engaged in two high-profile litigation challenges to hospital mergers that would ultimately prove successful. The first involved the FTC's challenge of ProMedica's August 2010 acquisition of St. Luke's Hospital in Toledo, Ohio. Prior to the acquisition, ProMedica operated three general acute-care hospitals in Lucas County, Ohio. St. Luke's was an independent general acute-care hospital in Maumee, Ohio, in the southwest Toledo area. ProMedica and St. Luke's consummated the deal under a "hold separate agreement" designed to preserve St. Luke's as an independent competitor while the FTC investigated the potential anticompetitive effects of the transaction.[37]

In January 2011, the FTC challenged the consummated transaction alleging that the acquisition of St. Luke's would reduce competition and allow ProMedica to raise prices for general acute-care hospital services, as well as inpatient obstetrical services in Lucas County. Specifically, the FTC alleged that the merger was 4-to-3 in the market for general acute-care services and 3-to-2 in the market for inpatient obstetrical services. According to the FTC, ProMedica would have had a market share of almost 60 percent for general acute-care services, and more than 80 percent for inpatient obstetrical services. In March 2011, the U.S. District Court for the Northern District of Ohio granted the FTC's request for a preliminary injunction and, in January 2012, the Chief Administrative Law Judge ruled in favor of the FTC and ordered ProMedica to divest St. Luke's to an FTC-approved buyer within six months.[38]

The Administrative Law Judge's decision was affirmed by the Commission in March 2012. The Commission affirmed the Administrative Law Judge's decision on liability, but defined the market for general acute-care inpatient hospital services somewhat differently, excluding sophisticated tertiary services from its scope on the grounds that St. Luke's did not generally provide tertiary services and because including them could obscure the analysis of competitive effects.[39] The Commission also concluded that the combination was like-

ly to substantially lessen competition in the separate market of inpatient obstetrical services sold to commercial health plans.[40] ProMedica appealed the Commission's decision to the Sixth Circuit, which upheld it in its entirely in April 2014.[41]

Significantly, the Sixth Circuit rejected ProMedica's efforts to discredit the FTC's product market definition, whereby the FTC "unbundled" inpatient obstetrical services from general acute-care services, a departure from the FTC's long-standing approach to market definition.[42] The court underscored that "[t]here are no market forces that bind primary, secondary, tertiary, and OB services together like a plywood sheet."[43] The court also upheld the FTC's approach to geographic market definition, which was based on an area of local competition, Lucas County, Ohio, instead of the purchaser's primary service area (PSA). Prior to *ProMedica*, the FTC had often defined the relevant geographic market as the acquirer's PSA, including in *Reading Health*, a case pending at the time of the ProMedica challenge. The Commission's use of yet another simplified approach to define geographic market again reflects the Commission's rejection of the Elzinga-Hogarty test in *Evanston*.

Phoebe Putney. Another high-profile case that was proceeding during *Rockford*, *Reading Health*, and *ProMedica* involved the December 2010 acquisition of Palmyra Health Center by Phoebe Putney Health System, an acquisition that gave Phoebe Putney control over the only two hospitals in Albany, Georgia, and a combined market share of allegedly more than 85 percent. The FTC moved to block the merger in April 2011 and, after protracted litigation with regard to whether the merger was immune from antitrust scrutiny under the state action doctrine (litigation which the FTC won at the Supreme Court[44]), the parties ultimately settled.[45] Although the case is most notable for the FTC defeating the application of the state action doctrine as a defense, and requiring a unique remedy,[46] it is also yet another example of Commissioner Rosch's concurrence in *Evanston* at work. Specifically, the FTC moved to block the merger on grounds that the deal would reduce competition by allowing the combined entity to raise prices charged to commercial health plans for general acute-care hospital services.[47]

Challenges to Hospital-Physician Group Acquisitions

In addition to its successful challenges to hospital mergers, one of the most significant developments since *Evanston* is the FTC's focus on physician group acquisitions by hospitals. Such vertical integration typically has not raised the same level of antitrust concerns as hospital mergers, perhaps because of the view that that there are low entry barriers in physician services markets and that the bargaining dynamics are different than those in hospital services markets.[48] Recent FTC enforcement actions, however, prove that such acquisitions, while usually procompetitive, can be successfully challenged under the same theories of harm used to challenge hospital-hospital mergers—namely, that the increased bargaining leverage of the merged entity will enable it to raise prices to health plans. Such challenges have also been made possible, at least in part, by the FTC's more precise analysis of markets, which was, in turn, made possible by the abandonment of the Elzinga-Hogarty test in *Evanston*.

Renown Health. The FTC's first successful challenge of a physician group acquisition involved Renown Health's acquisition of Sierra Nevada Cardiology Associates (SNCA) and Reno Heart Physicians (RHP).[49] At the time, Renown Health was the largest provider of acute-care hospital services in northern Nevada. Before the acquisitions, Renown Health did not employ any cardiologists, and virtually all of the cardiologists in the Reno area were affiliated with SNCA or RHP. In late 2010, Renown Health acquired SNCA's medical practice and hired its 15 cardiologists practicing in the Reno area. Subsequently, in March 2011, Renown Health acquired RHP and hired its 16 Reno-area cardiologists. Notably, the employment contracts between Renown Health and the newly hired cardiologists included non-compete provisions, which effectively prevented them from joining medical practices that competed with Renown Health.[50]

As a result of the acquisitions and non-compete clauses, the FTC contended that Renown Health employed 88 percent of the cardiologists in the Reno area.[51] The FTC alleged:

> After the consummation of the transaction with its combination of the two largest cardiologist physician groups in the Reno area, health plans can no longer threaten, implicitly or explicitly, to exclude Renown Health or the cardiologists employed by Renown Health. This substantially reduces the health plans' bargaining power, and substantially increases Renown Health's bargaining power, when negotiating rates for adult cardiology services in the Reno area.[52]

These allegations suggest that the consolidation would lead to higher prices for adult cardiology services in the Reno area. In August 2012, rather than fight it out in court, Renown Health agreed to settle the charges and release its staff cardiologists from their non-compete contract clauses, allowing up to ten of them to join competing cardiology practices.[53]

The FTC's success in this case demonstrates that it intends to use its theory of harm from hospital-hospital mergers (increased leverage over rate negotiations with health plans) in the context of hospital-physician group acquisitions—and at least one potential litigant preferred to settle rather litigate against that theory. Moreover, the FTC relied on a remarkably precise market definition—the market for adult cardiology services in the Reno area—a far cry from the Commission's "general acute-care inpatient services" market definition pre-*Evanston*.

St. Luke's. More recently, the FTC successfully challenged St. Luke's Health System's December 2012 acquisition of Saltzer Medical Group P.A.[54] At the time of the acquisition, St. Luke's, which is headquartered in Boise, Idaho, owned and operated six hospitals. Saltzer, located in Nampa, Idaho,

was Idaho's largest independent, multi-specialty physician practice group with approximately 44 physicians. Saltzer's specialties included family practice, internal medicine, and pediatrics. In March 2013, the FTC filed a complaint in the U.S. District Court for the District of Idaho seeking to block the acquisition.[55] Two rival hospitals also filed complaints.[56]

The FTC alleged that the combination would give St. Luke's the market power to demand higher rates for health care services provided by primary care physicians (PCPs) in Nampa, Idaho and surrounding areas.[57] According to the FTC, the acquisition created a single dominant provider of adult PCPs services in Nampa, with the combined entity commanding nearly a 60 percent share of the market. Once again, the FTC's theory of harm was that the acquisition increased St. Luke's bargaining leverage with health care plans and made an alternative network of health care providers that did not include St. Luke's or Saltzer's PCPs far less attractive to employers with employees living in Nampa.[58]

In January 2014, the district court sided with the FTC and ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. The court found that the combined entity included 80 percent of the PCPs in Nampa, making it the dominant provider in the Nampa area for primary care, and as such, it would have significant bargaining leverage over health insurance plans.[59] According to the court, such market power would enable the combined entity to "(1) negotiate higher reimbursement rates from health insurance plans that will be passed on to the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates."[60] The case has since been appealed to the Ninth Circuit, and is expected to be heard in late 2014 or early 2015.[61]

Like *Renown Health*, *St. Luke's* is important for the remarkably precise market definition alleged by the FTC and approved by the court. In addition, *St. Luke's* underscores the tension between the antitrust laws and the Affordable Care Act, and the need to ensure that efficiency claims are supported by empirical evidence. The court applauded "St. Luke's desire to improve quality and reduce costs by moving toward value-based or risk-based care and away from fee-for-service care" and acknowledged that the acquisition "was intended by St. Luke's and Saltzer to improve patient outcomes."[62] However, the court concluded that the claimed efficiencies were not merger-specific and thus were not cognizable.[63]

Conclusion

In the span of less than ten years, the FTC has gone from losing to winning every hospital merger challenge it brings. Moreover, the Commission has expanded the playing field by successfully challenging hospital acquisitions of physician practice groups. This did not happen overnight. Rather, it was due to a conscious effort by the Commission to find a way to be successful, even if this meant theoretical and procedural changes. In *Evanston*, the Commission made the critical decision to define the relevant geographic market based on actual competitive effects and reject the longstanding Elzinga-Hogarty test. Consequently, much of the Commission's recent success since is attributable to its ability to more precisely define markets and to determine competitive effects based on the merged hospitals' increased bargaining leverage over health insurers in rate negotiations. Nowhere is this more true than its recent victories in *Renown Health* and *St. Luke's*—two proposed acquisitions of physician practice groups.

The FTC will continue to be active in hospital-hospital and hospital-physician mergers as hospitals pursue integration in efforts to cut costs. FTC Chairwoman Edith Ramirez has identified the possibility of a retrospective of completed hospital-physician acquisitions, noting that "there would be great value in examining more closely the effects of combinations that have a significant vertical element."[64] Perhaps, as in *Evanston*, this retrospective will provide the FTC with yet additional enforcement targets and strategies to continue its winning streak for years to come. ■

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1 During this time period, the Department of Justice was not able to successfully challenge hospital mergers either. In *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997), for example, the DOJ lost its challenge to a proposed merger of two academic medical institutions when the court found that no market for "anchor hospitals" existed, the tertiary services market was larger than alleged, and the government had failed to prove likely anticompetitive effects for primary hospital services.

2 *See* FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1053–54 (8th Cir. 1999); FTC v. Freeman Hosp., 69 F.3d 260, 268–72 (8th Cir. 1995).

3 *Tenet Health Care Corp.*, 186 F.3d at 1054.

4 *See, e.g.*, FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1292–93 (W.D. Mich. 1996), *aff'd*, 1997-2 Trade Cas. (CCH) ¶ 71,863 (6th Cir. 1997).

5 *Id.* at 1302.

6 Timothy J. Muris, Chairman, FTC, Everything Old Is New Again: Health Care and Competition in the 21st Century, Prepared Remarks Before the 7th Annual Competition in Health Care Forum in Chicago, Illinois (Nov. 7, 2002), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/everything-old-new-again-health-care-and-competition-21st-century/murishealthcarespeech0211.pdf.

7 *Id.*

8 Opinion of the Commission, Evanston Nw. Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007) [hereinafter *Evanston* Commission Opinion], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf.

9 Litigated hospital mergers are: ProMedica Health Sys., Inc., FTC Docket No. 9346 (2012); Phoebe Putney Health Sys., Inc., FTC Docket No. 9348 (2013); FTC v. St. Luke's Health Sys., No. 13-cv-116-BLW (D. Idaho 2013). Abandoned transactions are: Inova Health Sys. Found., FTC Docket No. 9326 (2008); OSF Healthcare Sys., FTC Docket No. 9349 (2011); Reading Health Sys., FTC Docket No. 9353 (2012). Settled transaction is: Renown Health, Docket No. FTC C-4366 (2012).

10 *See infra* text accompanying notes 15–20.

11 Bernard Wysocki Jr., *FTC Seeks Documentation on Past Hospital Mergers*, WALL ST. J. (Sept. 26, 2002), http://online.wsj.com/news/articles/SB1032991927372639873; Complaint, Evanston Nw. Healthcare Corp., FTC Docket No. 9315 (Feb. 10, 2004) [hereinafter *Evanston* Complaint], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210emhcomplaint.pdf.

[12] Initial Decision, *Evanston*, FTC Docket No. 9315 (Oct. 21, 2005) [hereinafter *Evanston* Initial Decision], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2005/10/051021idtextversion.pdf.

[13] Notice of Appeal, *Evanston*, FTC Docket No. 9315 (Oct. 26, 2005), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2005/10/051026enhnotofappeal.pdf; Respondent's Corrected Appeal Brief, *Evanston*, FTC Docket No. 9315 (Jan. 12, 2006), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2006/01/060112enhappealbriefcorrected.pdf.

[14] Notably, the Commission disagreed with the Administrative Law Judge's order of divestiture and instead ordered ENH to cause each of the three hospitals to negotiate separately and maintain separate contracts with insurance companies. *Evanston* Commission Opinion, *supra* note 8, at 5, 90–91.

[15] *Evanston* is also significant from a procedural standpoint, as the FTC strayed from prior practice in two obvious ways: (1) the FTC challenged a merger that had already been consummated, as opposed to prospectively challenging a proposed acquisition; and (2) the FTC ordered a conduct remedy instead of the traditional structural remedy of divestiture (perhaps not surprising, given that the merger had been consummated for over seven years by the time of the Commission's Opinion). With regard to the conduct remedy, the Commission itself predicted that it was a one-shot deal: "[O]ur rationale for not requiring divestiture in this case is likely to have little applicability to our consideration of the proper remedy in a future challenge to an unconsummated merger, including a hospital merger . . . . Nor will our reasoning here necessarily apply to consideration of the appropriate remedy in a future challenge to a consummated merger, including a consummated hospital merger." *Evanston* Commission Opinion, *supra* note 8, at 90.

[16] *See Tenet Health Care Corp.*, 186 F.3d at 1052; *Butterworth Health Corp.*, 946 F. Supp. at 1291.

[17] *See* Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973); Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revised: The Case of Coal*, 23 ANTITRUST BULL. 1 (1978).

[18] *See Evanston* Complaint, *supra* note 11; *Evanston* Initial Decision, *supra* note 12, at 156.

[19] Concurring Opinion of Commissioner J. Thomas Rosch at 1, *Evanston*, FTC Docket No. 9315 (Aug. 6, 2007).

[20] *Id.* at 3.

[21] Complaint, Inova Health Sys. Found., FTC Docket No. 9326 (May 8, 2008) [hereinafter *Inova* Complaint], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/05/080509admincomplaint.pdf.

[22] Press Release, Fed. Trade Comm'n, FTC and Virginia Attorney General Seek to Block Inova Health System Foundations Acquisition of Prince William Health System (May 9, 2008), *available at* http://www.ftc.gov/news-events/press-releases/2008/05/ftc-and-virginia-attorney-general-seek-block-inova-health-system.

[23] *Id.*

[24] Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), *available at* http://www.inovanewsroom.org/statement-from-inova-health-system-and-prince-william-health-system-about-the-proposed-merger/.

[25] *See Inova* Complaint, supra note 21; *see also* Jeffrey W. Brennan & Sean P. Pugh, *Inova and the FTC's Revamped Merger Litigation Model*, ANTITRUST, Fall 2008, at 28.

[26] Brennan & Pugh, *supra* note 25, at 29.

[27] Unlike the FTC, the DOJ does not have an administrative option in merger enforcement—the DOJ can only initiate enforcement actions in federal district court. *See* 15 U.S.C. §§ 4, 25. Recently, there have been efforts to reduce disparities in the merger review process between the two agencies. For example, on September 8, 2014, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014 (SMARTER Act) was introduced in the U.S. House of Representatives. *See* H.R. 5402, 113th Cong. (2d Sess. 2014). As introduced, the bill would amend the Clayton Act and the Federal Trade Commission Act such that the FTC would have to exercise authority with respect to mergers in the same procedural manner as the DOJ. *Id.*

[28] Memorandum Opinion and Order, FTC v. OSF Healthcare Sys., No. 3:11-cv-50344 (N.D. Ill. Apr. 5, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/04/120505rockfordmemo.pdf.

[29] Complaint, OSF Healthcare Sys., FTC Docket No. 9349 (Nov. 18, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2011/11/111118rockfordcmpt_0.pdf; Complaint for Temporary Restraining Order and Preliminary Injunction, FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (complaint filed Nov. 18, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2011/11/111118rockfordcmpt.pdf.

[30] FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1076, (N.D. Ill. 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/04/120505rockfordmemo.pdf.

[31] Press Release, Fed. Trade Comm'n, OSF Healthcare System Abandons Plan to Buy Rockford in Light of FTC Lawsuit; FTC Dismisses Its Complaint Seeking to Block the Transaction (Apr. 13, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/04/osf-healthcare-system-abandons-plan-buy-rockford-light-ftc.

[32] Press Release, Fed. Trade Comm'n, FTC and Pennsylvania Attorney General Challenge Reading Health Systems Proposed Acquisition of Surgical Institute of Reading (Nov. 16, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/11/ftc-and-pennsylvania-attorney-general-challenge-reading-health.

[33] Complaint, Reading Health Sys., FTC Docket No. 9353 (Nov. 16, 2012) [hereinafter *Reading Health System* Complaint], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/11/121116readingsurgicalcmpt.pdf.

[34] Jeffrey W. Brennan & Margaret Guerin-Calvert, *Assessing Hospital Mergers and Rivalry in an Era of Health Care Reform*, ANTITRUST, Summer 2013, at 63, 66.

[35] *Reading Health System* Complaint, *supra* note 33, at 6–7.

[36] Order Dismissing Complaint, *Reading Health System*, FTC Docket No. 9353 (Dec. 7, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121207readingsircmpt.pdf.

[37] Press Release, Fed. Trade Comm'n, Citing Likely Anticompetitive Effects, FTC Requires ProMedica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area (Mar. 28, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/03/citing-likely-anticompetitive-effects-ftc-requires-promedica.

[38] FTC v. ProMedica Health Sys., Inc, No. 3:11-cv-00047-DAK, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) (Judgment Entry granting preliminary injunction,); Initial Decision, ProMedica Health System, Inc., FTC Docket No. 9346 (Jan. 5, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120105promedicadecision.pdf.

[39] Commission Opinion at 23, ProMedica Health Sys., Inc., FTC Docket No. 9346 (June 25, 2012) [hereinafter *ProMedica* Commission Opinion], *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/06/120625promedicaopinion.pdf.

[40] Final order, ProMedica Health Sys., Inc., FTC Docket No. 9346 (Mar. 28, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/03/120328promedicaorder.pdf).

[41] ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 573 (6th Cir. 2014).

[42] The Commission explained the basis for the separate obstetrics product market as follows: "OB services are offered under different competitive conditions than those applicable to the other services included in the GAC inpatient hospital services cluster market: one of the four Lucas County hospital providers . . . does not offer OB services." *ProMedica* Commission Opinion, *supra* note 39, at 25.

[43] *ProMedica Health System*, 749 F.3d at 568.

[44] FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

[45] Press Release, Fed. Trade Comm'n, Hospital Authority and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws (Aug. 22, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/08/hospital-authority-and-phoebe-putney-health-system-settle-ftc.

[46] Due to the unique circumstances surrounding the acquisition, namely the "Certificate of Need" laws in Georgia, the FTC was initially unable to require divestiture. Because Albany was deemed "over-bedded" by Georgia's strict need assessment criteria, it made it unlikely that any possible divestiture buyer would be able to obtain the necessary "Certificate of Need" approval to operate an independent hospital. As such, divestiture was not feasible and instead, the FTC, in a proposed consent agreement: (1) required the Hospital Authority and Phoebe Putney to give the FTC prior notice of any future transactions involving not only hospitals in the affected counties, but also other health care providers, such as inpatient and outpatient facilities or physician groups; and (2) prohibited the Hospital Authority from opposing a "Certificate of Need" application for a general acute-care hospital in the six-county area. Press Release, Fed. Trade Comm'n, Hospital Authority and Phoebe Putney Health System Settle FTC Charges that Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws (Aug. 22, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/08/hospital-authority-and-phoebe-putney-health-system-settle-ftc. However, on September 5, 2014, the Commission voted to withdraw its acceptance of the proposed consent agreement and to return the matter to administrative litigation on grounds that the Georgia's "Certificate of Need" laws may not, in fact, preclude structural relief. Press Release, Fed. Trade Comm'n, In Phoebe Putney Hospital Merger Case, FTC Rejects Proposed Consent Agreement; Parties to Return to Litigation, *available at* http://www.ftc.gov/news-events/press-releases/2014/09/phoebe-putney-hospital-merger-case-ftc-rejects-proposed-consent.

[47] Press Release, Fed. Trade Comm'n, FTC and Georgia Attorney General Challenge Phoebe Putney Health Systems Proposed Acquisition of Palmyra Park Hospital as Anticompetitive (Apr. 20, 2011), *available at* http://www.ftc.gov/news-events/press-releases/2011/04/ftc-and-georgia-attorney-general-challenge-phoebe-putney-health.

[48] *See* Memorandum Opinion and Order at 8–9, FTC v. OSF Healthcare Sys., No. 3:11-cv-50344 (N.D. Ill. Apr. 5, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/04/120505rockfordmemo.pdf.

[49] Although we refer to *Renown Health* as the FTC's first successful challenge of a hospital-physician group merger, note that in 2010 the FTC launched an investigation into Providence Health & Services' proposed acquisition of Spokane Cardiology and Heart Clinics Northwest. In 2011, before the FTC filed a complaint, the parties abandoned the transactions. As such, there is no analytical detail or insight to be drawn from the FTC's investigation. See Press Release, Fed. Trade Comm'n, FTC Bureau of Competition Director Issues Statement on Providence Health & Services Abandonment of Its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest (Apr. 8, 2011), *available at* http://www.ftc.gov/news-events/press-releases/2011/04/ftc-bureau-competition-director-issues-statement-providence; Statement of Bureau of Competition Director Richard Feinstein on the Abandonment by Providence Health & Services of Its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest in Spokane, Washington (Apr. 8, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/providence-health-services/spokane-cardiology-and-hearts-clinic-northwest/110321providencestatement.pdf.

[50] Complaint, Renown Health, FTC No. C-4366 (Aug. 3, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120806renownhealthcmpt.pdf.

[51] *Id.* ¶ 19.

[52] *Id.* ¶ 26.

[53] Press Release, Fed. Trade Comm'n, FTC Order Will Restore Competition for Adult Cardiology Services in Reno, Nevada (Aug. 6, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/08/ftc-order-will-restore-competition-adult-cardiology-services-reno.

[54] Press Release, Fed. Trade Comm'n, Statement of FTC Chairwoman Edith Ramirez on the U.S. District Court in the District of Idaho Ruling in the Matter of the Federal Trade Commission and the State of Idaho v. St. Luke's Health System Ltd. and Saltzer Medical Group, P.A. (Jan. 24, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/statement-ftc-chairwoman-edith-ramirez-us-district-court-district. *See also* Saint Alphonsus Med. Ctr. v. St. Luke's Health Sys., Ltd., Nos. 1:12-00560 & 1:13-00116, 2014 WL 407446 (D. Idaho Jan. 24, 2014) (ordering the divestiture of the affiliation between St. Luke's and the Saltzer Medical Group).

[55] Complaint for Permanent Injunction, FTC v. St. Luke's Health Sys., Ltd., No. 13-116 (D. Idaho Mar. 26, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf.

[56] Press Release, Fed. Trade Comm'n, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/03/ftc-and-idaho-attorney-general-challenge-st-lukes-health-systems.

[57] Complaint for Permanent Injunction, FTC v. St. Luke's Health Sys., Ltd., *supra* note 55, ¶¶ 3, 37. Interestingly, the FTC limited its complaint to the physician services market and decided not to challenge the acquisition's competitive effects in the hospital services market. As one commentator explained, where the relevant physician market is primary care, the FTC could well be concerned "about the impact of the vertical integration on competition in the *hospital* services market. Primary care physicians control a high proportion of patient referrals to hospitals, both directly . . . and indirectly. A hospital that employs a large share of the PCPs has a leg up on the competition." Robert W. McCann & Kenneth N. Vorrasi, *Antitrust Treatment of Physician-Hospital Integration Post-*FTC v. St. Luke's, ANTITRUST, Summer 2014, at 77.

[58] Complaint for Permanent Injunction, FTC v. St. Luke's Health Sys., Ltd., *supra* note 55, ¶ 3, 43.

[59] *Saint Alphonsus Medical Center*, 2014 WL 407446, at *1.

[60] *Id.*

[61] Most recently, the Ninth Circuit agreed to let St. Luke's hold on to Saltzer while it appeals the district court's order of divestiture. Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 14-35173 (9th Cir. July, 25, 2014) (order granting stay of district court proceeding pending appeal).

[62] *Saint Alphonsus Medical Center*, 2014 WL 407446, at *2, 14.

[63] *Id.* at *24.

[64] Remarks by Edith Ramirez, Chairwoman, FTC, *Retrospectives at the FTC: Promoting an Antitrust Agenda* 11, ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium 11 (June 28, 2013), *available at* http://www.ftc.gov/public-statements/2013/06/retrospectives-ftc-promoting-antitrust-agenda.