Antitrust Constraints on Physician Consolidation and Collaborations

Colin R. Kass, Partner
David A. Munkittrick, Associate
Richard J. Zall, Partner

December 4, 2019

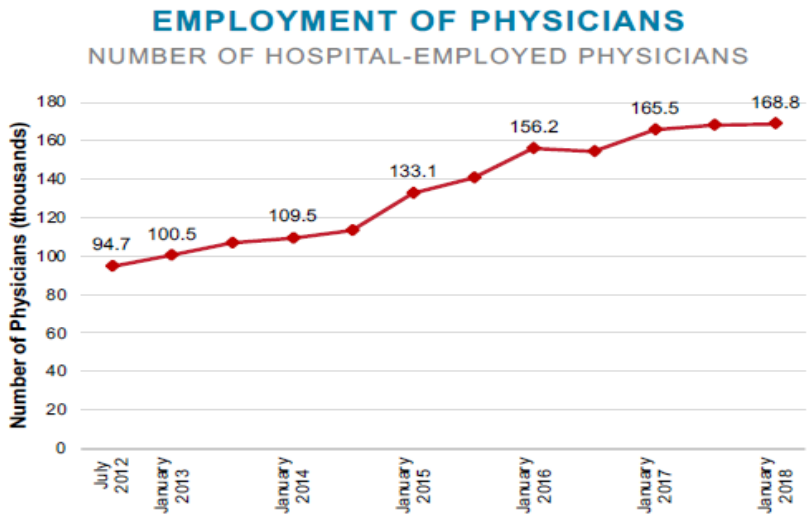
Proskauer

The Physician Consolidation Trend

Hospital employed physicians:

49% (2012-2015)

6% (2016-2018)



Practices with 1 to 10 physicians:

65.6% (2012)

55.9% (2018)

Practices with 11 or more physicians:

34.4% (2012)

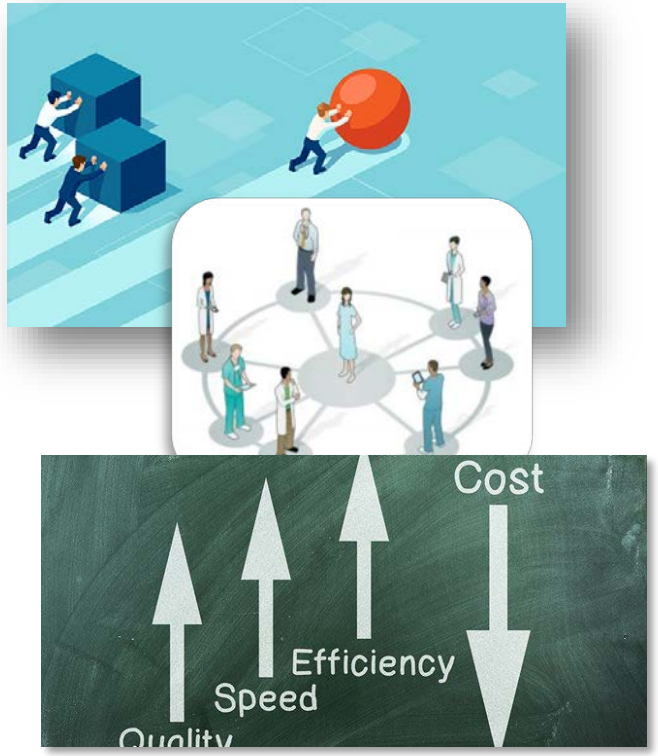
44.1% (2018)

Sources: Physicians Advocacy Institute, Physician Employment Trends: http://www.physiciansadvocacyinstitute.org/PAI-Research/Physician-Employment; The Physicians Foundation, 2018 Survey of America's Physicians

Proskauer

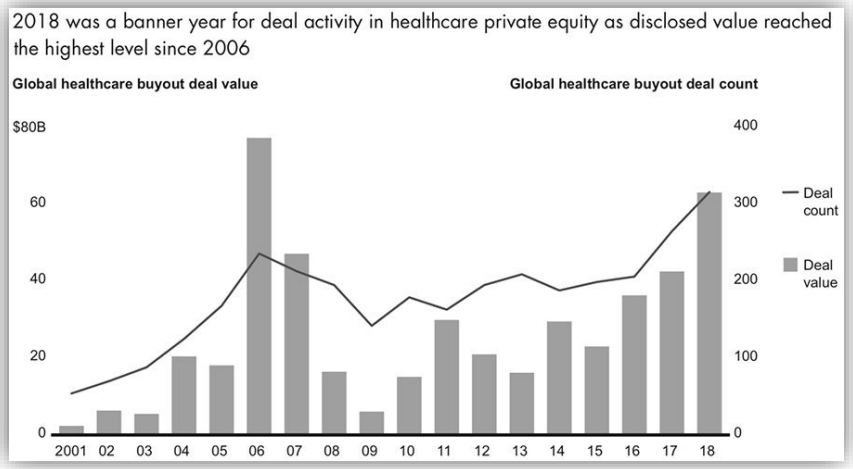
The Physician Consolidation Trend

- There are good reasons for it:
  - Shift to value-based care models
  - Integrated and coordinated patient care
  - Collective development of protocols and benchmarks
  - Pooled resources and expertise
  - Increased bargaining power
  - Referral pipeline from physician visit to hospital bed

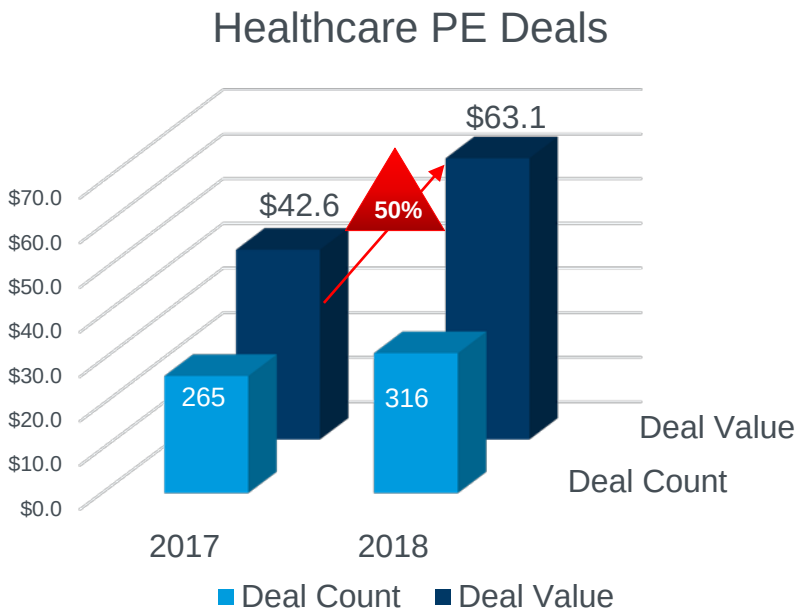


Proskauer

Private Equity Firms Are Investing in Physician Practices



Favorable long-term trends: aging population, growth in chronic conditions, push towards more efficient healthcare delivery



Proskauer

The FTC and State AGs are Taking Notice

Physician group mergers are something the FTC is "***very alert to***…. It is a source of concern."
-2016

The FTC rejects arguments from hospitals that M&A is needed to implement the greater coordination of care and provider risk-taking that are encouraged by the Affordable Care Act.

"This act provides the attorney general notice of ***all*** material health care transactions in this state so the attorney general has the information necessary to determine whether an investigation … is warranted."

WA H.B. 1607 (in effect Jan. 1, 2020)

WASHINGTON

Proskauer

Navigating the Antitrust Laws

Mergers. Section 7 of the Clayton Act

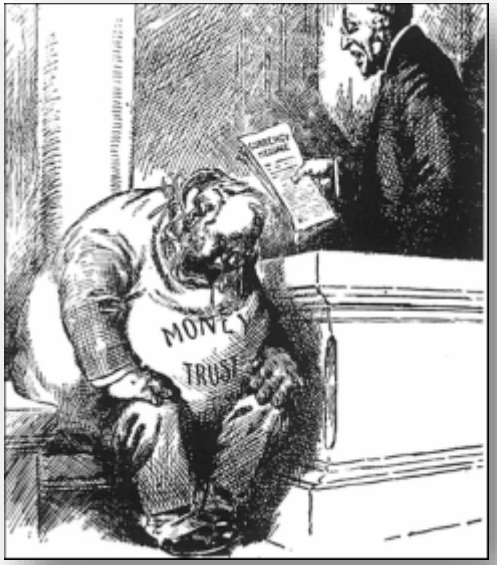
- Prohibits acquisitions that "may tend to substantially lessen competition"

Agreements. Section 1 of the Sherman Act

- Prohibits agreements that "unreasonably restrain competition"

Doing Business. Section 2 of the Sherman Act

- Prohibits abuse of dominance



Proskauer

Physician Consolidation and Collaboration Can Take Many Forms

Acquisitions

- Hospital Staff Physicians
- Hospital Dominated Physician-Hospital Organizations (PHOs)
- Physician Practice Roll-Ups

Collaborations

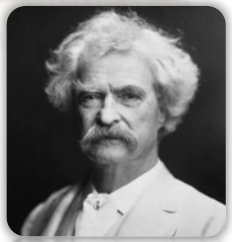
- Virtual J.V.s
- Financially-Integrated IPAs
- Clinically Integrated IPAs
- Messenger Model IPAs

Consolidation Hypo

- I run a large IHN. I want to acquire the largest regional independent physician group. It will:
  - Accelerate my ability to offer value-based contracting; and
  - Reduce costs and improve quality by giving me greater control over patient care
- The acquisition price is astronomical. But I can make up for it by moving the practice onto my current – higher reimbursement – payor contracts

Section 7 is Designed to Stop Anticompetitive Mergers in their Incipiency – Before They Happen

"It's tough to make predictions, especially about the future."



"Prophesy is a good line of business, but it is full of risks."

"[M]istaken inferences in [antitrust] cases ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect."

-Matsushita Elec. Indus. Co., 475 U.S. at 594

Proskauer

Anatomy of a Merger Challenge

Plaintiffs' Prima Facie Case

Market Definition
- Product Market
- Geographic Market

High Market Shares

Defenses

No anticompetitive effects

No barriers to entry

Efficiencies

Presumptively Unlawful

OSF/Rockford

OSF Healthcare System Abandons Plan to Buy Rockford in Light of FTC Lawsuit;FTC Dismisses its Complaint Seeking to Block the Transaction

Share This Page

FOR RELEASE

April 13, 2012

TAGS: Competition

The Federal Trade Commission has dismissed the complaint it issued last November seeking to block OSF Healthcare System's acquisition of rival health care provider Rockford Health System, in light of OSF Healthcare's decision to abandon the proposed transaction.

The Commission voted 5-0 to dismiss the complaint, after OSF announced on Thursday that it would no longer seek to complete the acquisition.

"The Federal Trade Commission is gratified by OSF Healthcare's decision to abandon its attempt to acquire rival hospital services provider Rockford Health System," said Chairman Jon Leibowitz. "As we said in November when we filed our complaint, health care consumers and employers in Rockford would have paid a price had the deal been allowed to proceed. The FTC remains vigilant, and will not hesitate to challenge deals in the health care sector that are likely to decrease competition and lead to higher prices or fewer services."

The FTC issued the complaint in November 2011, alleging that OSF's proposed acquisition of Rockford Health System would reduce competition in two markets in the Rockford area: 1) general acute-care inpatient services, and 2) primary care physician services. Specifically, OSF would control 64 percent of general acute-care inpatient services post-acquisition, and face only one competitor, SwedishAmerican Health System. The two hospitals together would control more than 99 percent of the market for general acute-care services. In the market for primary care physician services, the complaint alleged that, post-acquisition, OSF and SwedishAmerican together would control almost 60 percent of all primary care physician services.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, 601 New Jersey Ave., Room 7117, Washington, DC 20580. To learn more about the Bureau of Competition, read Competition Counts. Like the FTC on Facebook and follow us on Twitter.

- OSF sought to acquire Rockford Health System
- FTC alleged anticompetitive effects in the hospital market and PCP market
- OSF/Rockford would control:
  - 37% of PCPs in the area
  - 60% of hospital-owned physician groups
- District court granted a PI (but expressed skepticism of the PCP claim)
- Parties abandoned transaction on eve of FTC trial

Physician Consolidation is Largely About (Geographic) Market Definition

"The determination of the relevant geographic market is an important consideration in an antitrust case. If the market is defined ***too broadly***, anticompetitive action, which is proscribed by Section 7, might go undetected. On the other hand, if the market is defined ***too narrowly***, behavior which does not tend substantially to lessen competition in a section of the country, improperly might be found to fall within the ambit of the Clayton Act." *Weeks Dredging & Contracting, Inc. v. Am. Dredging Co.*, 451 F. Supp. 468, 489 (E.D. Pa. 1978)


United States Court of Appeals
For the Eighth Circuit

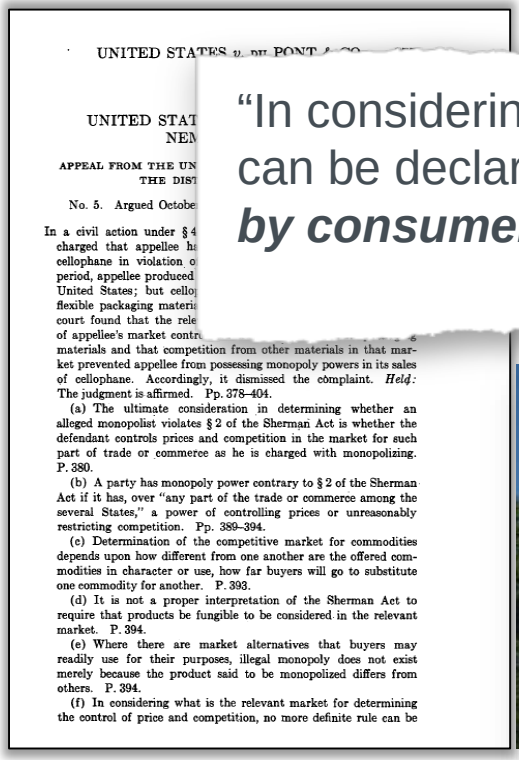
- Product markets are generally defined for PCPs and ***each*** Specialty.
- Geographic markets are local. The question is just how local?

"[T]he four relevant product markets [are] adult primary care services, pediatric services, OB/GYN physician services, and general surgeon services …."

FTC v. Sanford Health (8th Cir.)

Proskauer

Market Definition: The Supreme Court



UNITED STATES v. DU PONT & CO.

UNITED STAT
NEM

APPEAL FROM THE UN
THE DIST

No. 5. Argued Octobe

In a civil action under § 4
charged that appellee h
cellophane in violation o
period, appellee produced
United States; but cello
flexible packaging materi
court found that the rele
of appellee's market contr
materials and that competition from other materials in that mar-
ket prevented appellee from possessing monopoly powers in its sales
of cellophane. Accordingly, it dismissed the complaint. *Held:*
The judgment is affirmed. Pp. 378–404.

(a) The ultimate consideration in determining whether an alleged monopolist violates § 2 of the Sherman Act is whether the defendant controls prices and competition in the market for such part of trade or commerce as he is charged with monopolizing. P. 380.

(b) A party has monopoly power contrary to § 2 of the Sherman Act if it has, over "any part of the trade or commerce among the several States," a power of controlling prices or unreasonably restricting competition. Pp. 389–394.

(c) Determination of the competitive market for commodities depends upon how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. P. 393.

(d) It is not a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market. P. 394.

(e) Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. P. 394.

(f) In considering what is the relevant market for determining the control of price and competition, no more definite rule can be

"In considering what is the relevant market.., no more definite rule can be declared than that commodities ***reasonably interchangeable by consumers*** for the same purposes make up" the relevant market.

United States v. E.I. du Pont de Nemours & Co., Cellophane, 351 U.S. 377, 395 (1956)

Proskauer

Market Definition: The License Plate Acronyms

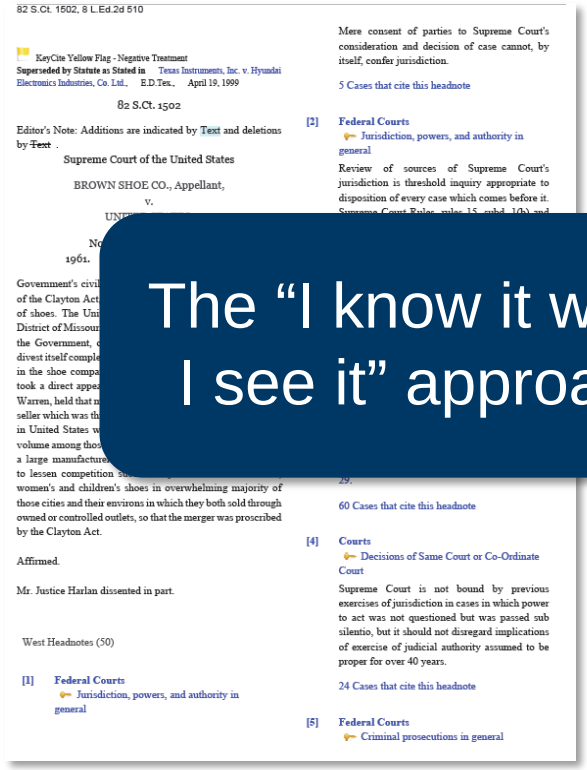
- **Hypothetical Monopolist Test**
  - DOJ/FTC Originated Test
  - Yields narrow markets
  - Maximum condemnation
- **Small but Significant Non-transitory Increase in Price**

"This test measures whether increasing a product's price—usually by five percent—results in a substantial number of consumers purchasing an alternative product."

Kentucky Speedway, LLC v. NASCAR, 588 F.3d 908 (6th Cir. 2009)

Proskauer

The Old Brown Shoe



82 S.Ct. 1502, 8 L.Ed.2d 510

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Texas Instruments, Inc. v. Hyundai Electronics Industries, Co. Ltd., E.D.Tex., April 19, 1999

82 S.Ct. 1502

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of the United States

BROWN SHOE CO., Appellant,
v.

1961.

Government's civil
of the Clayton Act
of shoes. The Uni
District of Missour
the Government,
divest itself comple
in the shoe compa
took a direct appe
Warren, held that n
seller which was th
in United States w
volume among thos
a large manufacture
to lessen competition
women's and children's shoes in overwhelming majority of those cities and their environs in which they both sold through owned or controlled outlets, so that the merger was proscribed by the Clayton Act.

Affirmed.

Mr. Justice Harlan dissented in part.

West Headnotes (50)

[1] **Federal Courts**
Jurisdiction, powers, and authority in general

Mere consent of parties to Supreme Court's consideration and decision of case cannot, by itself, confer jurisdiction.

5 Cases that cite this headnote

[2] **Federal Courts**
Jurisdiction, powers, and authority in general

Review of sources of Supreme Court's jurisdiction is threshold inquiry appropriate to disposition of every case which comes before it.

29.

60 Cases that cite this headnote

[4] **Courts**
Decisions of Same Court or Co-Ordinate Court

Supreme Court is not bound by previous exercises of jurisdiction in cases in which power to act was not questioned but was passed sub silentio, but it should not disregard implications of exercise of judicial authority assumed to be proper for over 40 years.

24 Cases that cite this headnote

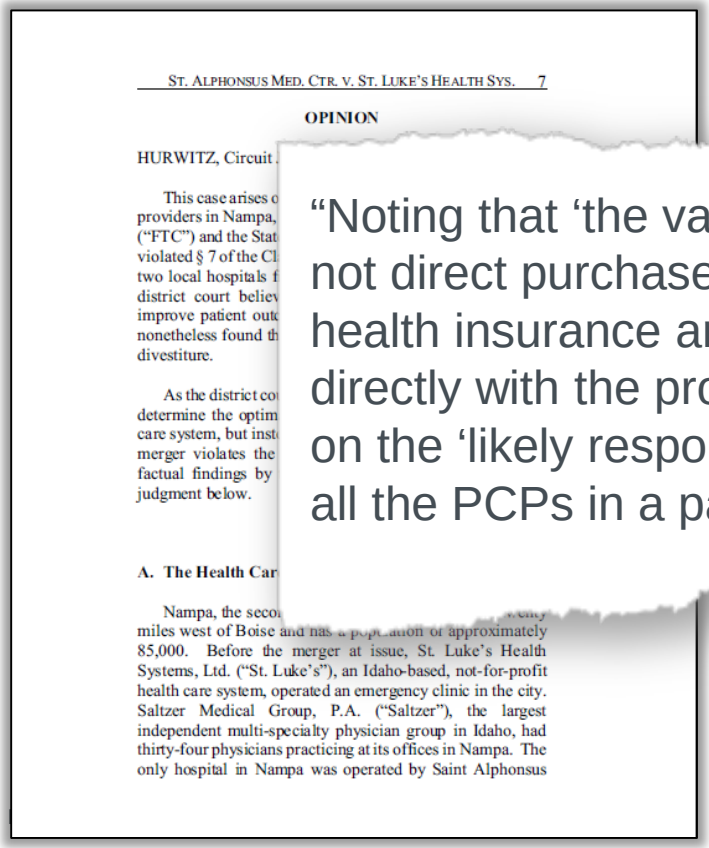
[5] **Federal Courts**
Criminal prosecutions in general

The "I know it when I see it" approach

- ❑ Industry or public recognition
- ❑ Product's peculiar characteristics and uses
- ❑ Unique production facilities
- ❑ Distinct customers
- ❑ Distinct prices
- ❑ Sensitivity to price changes
- ❑ Specialized vendors

Proskauer

The FTC Focuses on Insurer Contracting and Derivative Patient Demand



ST. ALPHONSUS MED. CTR. v. ST. LUKE'S HEALTH SYS. 7

OPINION

HURWITZ, Circuit

This case arises o
providers in Nampa,
("FTC") and the Stat
violated § 7 of the Cl
two local hospitals f
district court believ
improve patient outc
nonetheless found th
divestiture.

As the district co
determine the optim
care system, but inst
merger violates the
factual findings by
judgment below.

A. The Health Car

Nampa, the seco
miles west of Boise and has a p[illegible] of approximately
85,000. Before the merger at issue, St. Luke's Health
Systems, Ltd. ("St. Luke's"), an Idaho-based, not-for-profit
health care system, operated an emergency clinic in the city.
Saltzer Medical Group, P.A. ("Saltzer"), the largest
independent multi-specialty physician group in Idaho, had
thirty-four physicians practicing at its offices in Nampa. The
only hospital in Nampa was operated by Saint Alphonsus

"Noting that 'the vast majority of health care consumers are not direct purchasers of health care—the consumers purchase health insurance and the insurance companies negotiate directly with the providers,' the district court correctly focused on the 'likely response of insurers to a hypothetical demand by all the PCPs in a particular market for a SSNIP."

FTC et al. v. St. Luke's Health System (9th Cir.)

Physician Markets Are Smaller than Hospital Markets

"Evidence was presented that insurers generally need local PCPs to market a health care plan."

FTC et al. v. St. Luke's Health System (9th Cir.)

Local Primary CARE

Proskauer

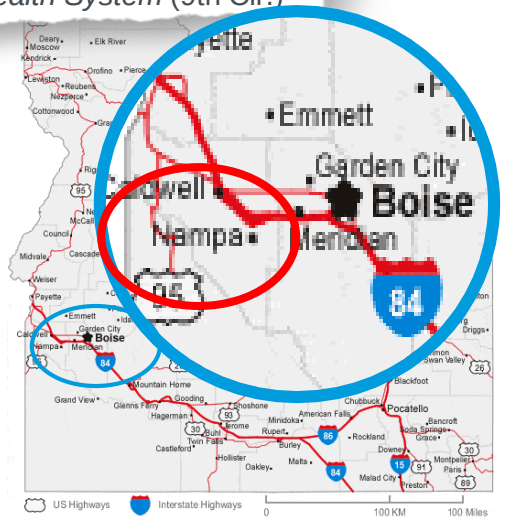
St. Luke's/Saltzer

"Because St. Luke's and Saltzer had been each other's closest substitutes in Nampa, the district court found the acquisition limited the ability of insurers to negotiate with the merged entity."

FTC et al. v. St. Luke's Health System (9th Cir.)

- Three major cities in the Boise MSA -- Boise, Nampa, Meridian – all within 20 miles
- Market shares in the Boise MSA were small
- Nampa is in Canyon County. Combined shares in Canyon County were also small.
- But the parties had 80% of PCPs in Nampa City
- Evidence showed 68% of Nampa residents used Nampa PCPs, only 15% traveled to Boise

Conclusion: Market limited to Nampa



Proskauer

FTC v. Sanford Health

- Sanford Health, a large IHN, with 160 physicians sought to acquire Mid-Dakota Clinic, with 61 physicians in Bismark
- Sanford would have 99.8% of general surgeon services, 98.6% of pediatric services, and 85.7 of adult PCP services in Bismark

United States Court of Appeals
For the Eighth Circuit

No. 17-3783

Federal Trade Commission; State of North Dakota,

Plaintiffs - Appellees,

v.

Sanford Health; Sanford Bismarck; Mid Dakota Clinic, P.C.,

Defendants - Appellants.

State of Minnesota; State of Alaska; State of California; State of Delaware; State of Hawaii; State of Idaho; State of Iowa; State of Mississippi; State of Massachusetts; State of Pennsylvania; Puerto Rico; State of Wyoming,

Amici on Behalf of Appellee(s).

Appeal from United States District Court
for the District of North Dakota - Bismarck

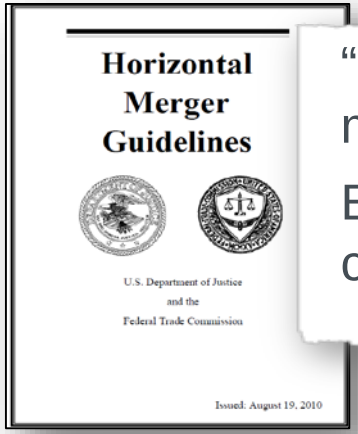
Submitted: November 13, 2018
Filed: June 13, 2019

Before COLLOTON, SHEPHERD, and STRAS, Circuit Judges.

"Representatives from North Dakota's three largest insurance companies [testified that] an insurance plan's network must include each of these services to be competitive in the Bismarck-Mandan area."

FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019)

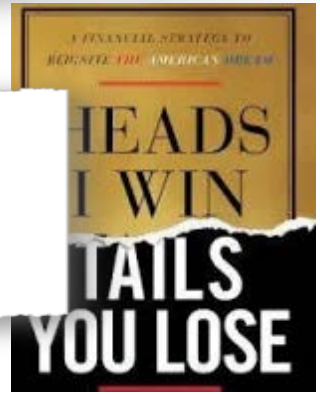
If You Can't Win, Cheat…



"Some of the tools used by the Agencies …do not rely on market definition….

Evidence of competitive effects … may more directly predict competitive effects [than] inferences from market definition.

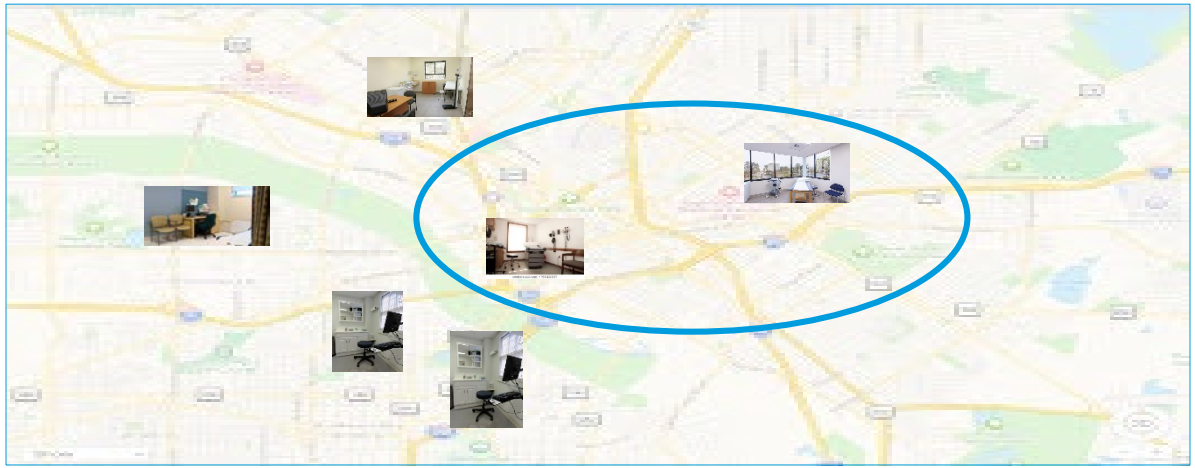
"Where analysis suggests alternative … candidate markets [that] lead to very different inferences, it is particularly valuable to examine more direct forms of evidence."



Proskauer

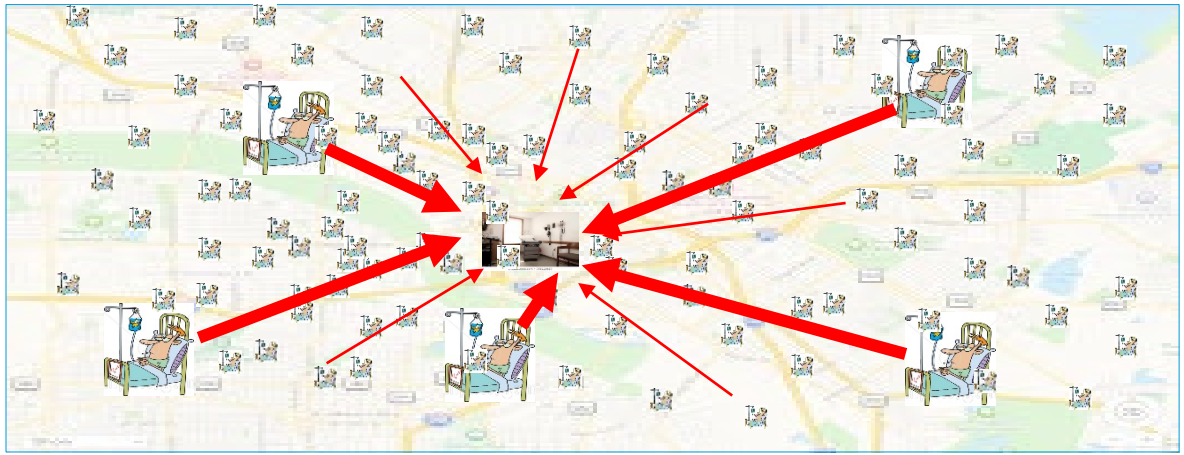
Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- Illustration:
  - A typical acquisition in a 6-5 competitor market



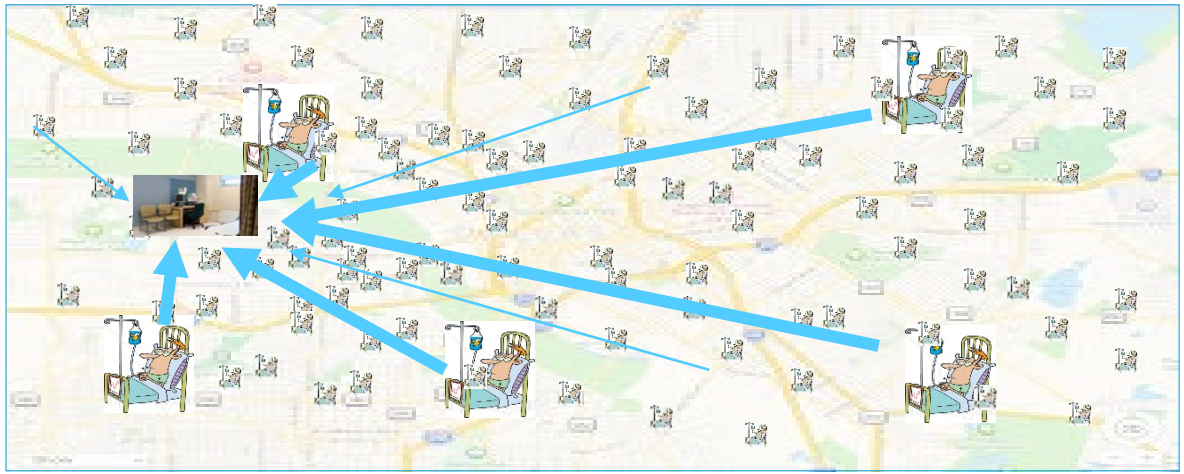
Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- Patients travel throughout the city to visit their preferred doc



Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- Patients travel throughout the city to visit their preferred doc
  - The same is true for all the docs: patients travel throughout the city



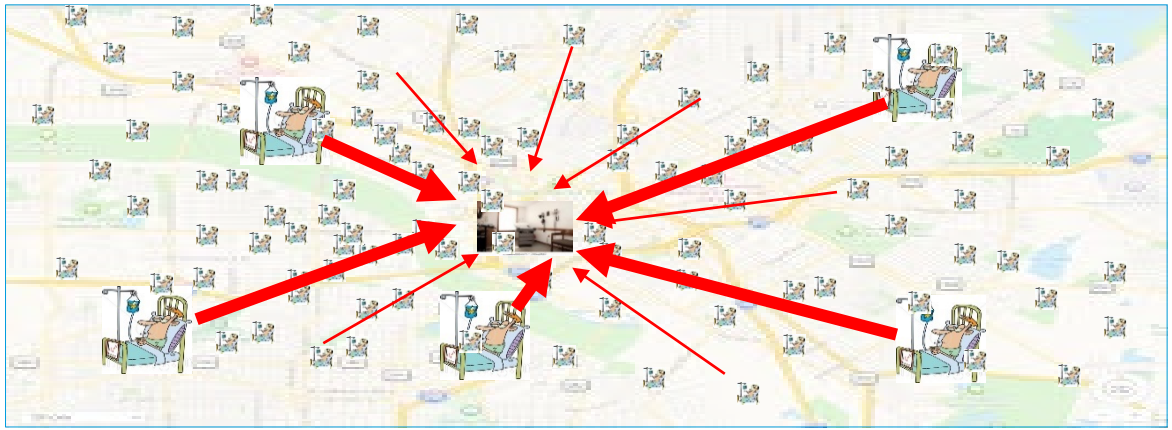
Proskauer

Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- Conclusion
  - The geographic market includes all docs' offices
  - Acquisition is fine, market shares are only 33%

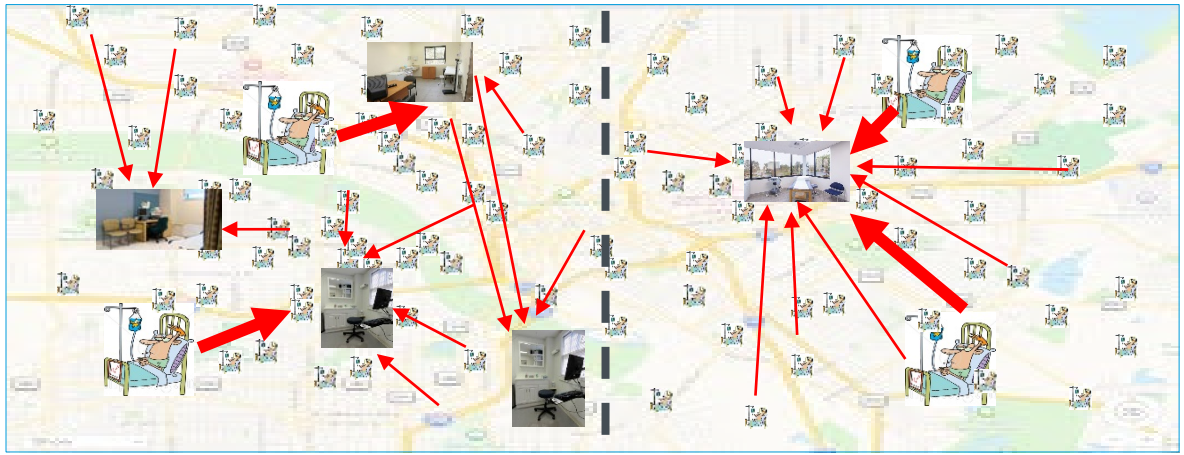
Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- But wait…. There's more….
  - "Diversion ratio's:
    - What is the next best substitute?
    - Where would patients go the acquire practice disappeared?



Diversion Ratios and The Proximity Model: The FTC's Latest Effort to Goose Market Shares

- Lo and behold, Diversion Ratio's exceed 50%
  - "The Agencies may seek to quantify the extent of direct competition .. By estimating the diversion ratio.... [That ratio] need not approach a majority" to infer pricing power." 201 Merger Guidelines



Bargaining Power-Based Competitive Effects: A One-Way-Ratchet Toward Merger Condemnation?

- FTC Says Exercise of "Bargaining Power" Can Cause Competitive Harm, But Can't Ameliorate it
- A Tale of Two Cases: St. Luke's and Anthem/Cigna

St. Lukes

- Documents saying "the clout of our entire network could be used to negotiate favorable terms with insurers."
- Deemed anticompetitive even though limited competitive overlap.

- Increase in bargaining power – that reduces reimbursement rates for insurers – not a cognizable efficiency.
- Claims of increased bargaining power "floundered in the face of business reality…. The most likely result of [lowering reimbursement is] degrading service levels.

Anthem/Cigna

Proskauer

The Dominant Purchaser Defense?

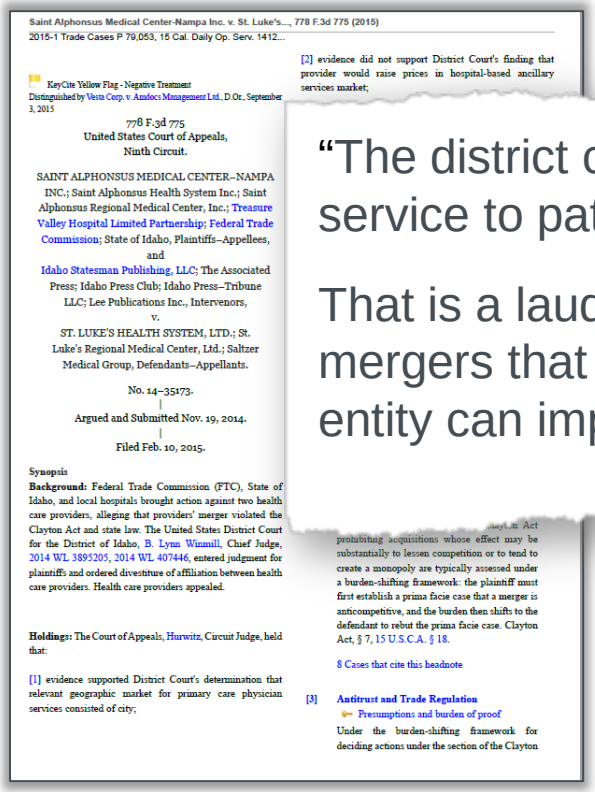
The Defense: "[T]he district court failed to account for Blue Cross's dominant position in the market: a provider in North Dakota, they argue, would not be able to impose a price increase on Blue Cross." *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019)

The Court: "[T]he question is not whether a monopolist would increase prices on an insurer, but whether the insurer will shift from one product to the other in response to changes in their relative costs. … A Blue Cross representative testified that Stanford, after the proposed merger, would indeed have the power to force Blue Cross to choose between raising prices or leaving the Bismarck-Mandan region."

FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019)

Proskauer

But Physician Consolidation Will Save Lives….



Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's..., 778 F.3d 775 (2015)
2015-1 Trade Cases P 79,053, 15 Cal. Daily Op. Serv. 1412...

KeyCite Yellow Flag - Negative Treatment
Distinguished by Vesta Corp. v. Amdocs Management Ltd., D Or., September 3, 2015

778 F.3d 775
United States Court of Appeals,
Ninth Circuit.

SAINT ALPHONSUS MEDICAL CENTER–NAMPA INC.; Saint Alphonsus Health System Inc.; Saint Alphonsus Regional Medical Center, Inc.; Treasure Valley Hospital Limited Partnership; Federal Trade Commission; State of Idaho, Plaintiffs–Appellees,
and
Idaho Statesman Publishing, LLC; The Associated Press; Idaho Press Club; Idaho Press–Tribune LLC; Lee Publications Inc., Intervenors,
v.
ST. LUKE'S HEALTH SYSTEM, LTD.; St. Luke's Regional Medical Center, Ltd.; Saltzer Medical Group, Defendants–Appellants.

No. 14–35173.

Argued and Submitted Nov. 19, 2014.

Filed Feb. 10, 2015.

Synopsis
Background: Federal Trade Commission (FTC), State of Idaho, and local hospitals brought action against two health care providers, alleging that providers' merger violated the Clayton Act and state law. The United States District Court for the District of Idaho, B. Lynn Winmill, Chief Judge, 2014 WL 3895205, 2014 WL 407446, entered judgment for plaintiffs and ordered divestiture of affiliation between health care providers. Health care providers appealed.

Holdings: The Court of Appeals, Hurwitz, Circuit Judge, held that:

[1] evidence supported District Court's determination that relevant geographic market for primary care physician services consisted of city;

[2] evidence did not support District Court's finding that provider would raise prices in hospital-based ancillary services market;

prohibiting acquisitions whose effect may be substantially to lessen competition or to tend to create a monopoly are typically assessed under a burden-shifting framework: the plaintiff must first establish a prima facie case that a merger is anticompetitive, and the burden then shifts to the defendant to rebut the prima facie case. Clayton Act, § 7, 15 U.S.C.A. § 18.

8 Cases that cite this headnote

[3] **Antitrust and Trade Regulation**
Presumptions and burden of proof
Under the burden-shifting framework for deciding actions under the section of the Clayton

"The district court concluded that St. Luke's might provide better service to patients after the merger.

That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition …simply because the merged entity can improve its operations."

St. Luke's Health Sys., Ltd., 778 F.3d at 792

Proskauer

Courts Are Skeptical of Efficiency Defenses

"I said back then that there should be no general defense of efficiency. I still think this is right. It is rarely feasible to determine by the methods of litigation the effect of a merger on the costs of the firm created by the merger."

"The Supreme Court has never expressly approved an efficiencies defense to a § 7 claim. And none of the reported appellate decisions have actually held that a defendant has rebutted a prima facie case with an efficiencies defense."

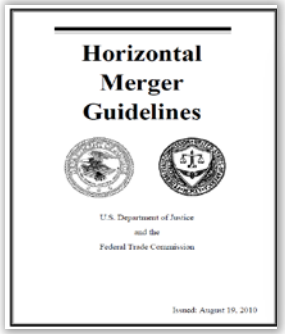
St. Luke's Health Sys., Ltd., 778 F.3d at 792

Proskauer

Efficiency Defenses Are Hard to Prove

There is “no empirical evidence to support the theory that St. Luke's needs a core group of employed primary care physicians beyond the number it had before the Acquisition to successfully make the transition to integrated care,”

And, in any event, “a committed team can be assembled without employing physicians.” *St. Luke's Health Sys., Ltd.*, 778 F.3d at 792



Efficiencies must be: (i) verifiable, (ii) merger-specific, (iii) likely to be passed on to the consumer, and (iv) in the case of high market shares, “extraordinarily great” to offsent any anticompetitive effects.

Proskauer

Hypo: Collaboration

I don’t need to acquire physician practices. It’s too expensive anyway. I can achieve my goals through looser affiliations, so long as I can engage in joint payor negotiations.

What can I do?

The FTC Recognizes the Benefits of Physician Collaboration

"By developing and implementing mechanisms to encourage physicians to collaborate, many physician network[s] … promise significant procompetitive benefits for consumers."

The Three Forms of Recognized Collaborations

Financially-Integrated Collaborations

Clinically-Integrated Collaborations

Messenger Model Collaborations

But be careful…. Sham collaborations won't work

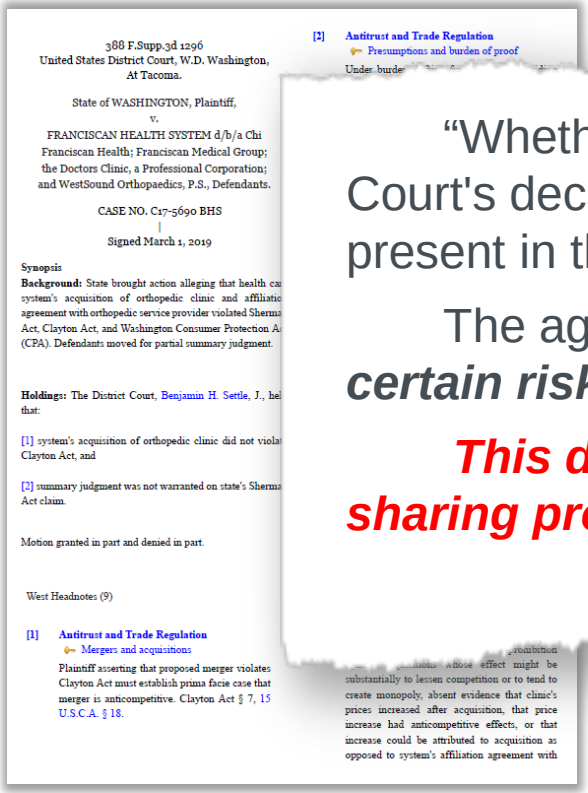
CHI Franciscan Health/The Doctor's Clinic

- Two-Stage deal
  - **Stage 1:** Franciscan acquires WSO and its 7 orthopedic physicians
  - **Stage 2:** 6 months later, Franciscan affiliates with TDC, and its 54 physicians (including 5 orthopedists)
- The court held that the earlier WSO acquisition was not anticompetitive
- But it held that that there was a plausible allegation of a per se illegal agreement arising out of the TDC affiliation

Financial Integration

- Antitrust Safety Zones for Financially-Integrated Physician Networks
  - If exclusive, no more than 20% of the market in any specialty
  - If non-exclusive, no more than 30% of the market
- Examples of “substantial risk sharing”:
  - Agreement to accept a “capitated rate”
  - Use of significant financial incentives based on group performance.
  - Sharing of group profits/losses

Market Allocations Are Not the Same as Agreements to Share Financial Risks



388 F.Supp.3d 1296
United States District Court, W.D. Washington, At Tacoma.

State of WASHINGTON, Plaintiff,
v.
FRANCISCAN HEALTH SYSTEM d/b/a Chi Franciscan Health; Franciscan Medical Group; the Doctors Clinic, a Professional Corporation; and WestSound Orthopaedics, P.S., Defendants.

CASE NO. C17-5690 BHS

Signed March 1, 2019

Synopsis
Background: State brought action alleging that health ca system's acquisition of orthopedic clinic and affiliatio agreement with orthopedic service provider violated Sherma Act, Clayton Act, and Washington Consumer Protection A (CPA). Defendants moved for partial summary judgment.

Holdings: The District Court, Benjamin H. Settle, J., hel that:

[1] system's acquisition of orthopedic clinic did not viola Clayton Act, and

[2] summary judgment was not warranted on state's Sherma Act claim.

Motion granted in part and denied in part.

West Headnotes (9)

[1] **Antitrust and Trade Regulation**
Mergers and acquisitions
Plaintiff asserting that proposed merger violates Clayton Act must establish prima facie case that merger is anticompetitive. Clayton Act § 7, 15 U.S.C.A. § 18.

[2] **Antitrust and Trade Regulation**
Presumptions and burden of proof
Under burde

prohibition ... whose effect might be substantially to lessen competition or to tend to create monopoly, absent evidence that clinic's prices increased after acquisition, that price increase had anticompetitive effects, or that increase could be attributed to acquisition as opposed to system's affiliation agreement with

"Whether per se analysis is available is contingent on the Court's decision about the degree of economic integration present in the TDC Affiliation….

The agreements are designed to ***divide and assign certain risks*** between TDC and Franciscan

This does not represent a finding that the parties are sharing profits and losses."

Washington v. Franciscan Health Sys., 388 F. Supp. 3d 1296 (W.D. Wash. 2019)

Proskauer

Clinical Integration is Not Easy – But it Works

- Clinically integrated programs will involve:
  - Common protocols, performance standards and goals,
  - Referral guidelines or requirements,
  - Individual and group performance criteria;
  - Common information systems
  - Education/training
- In general, the test is whether the patient care and/or operations meaningfully differ in ways that will likely benefit patients/insurers versus non-integrated business models

Takeaways

- Most physician consolidation is okay
  - Consolidation may create a dominant position in a relatively small area, which can raise concerns
  - Avoiding or defeating a challenge is a fact and data intensive process
- Most Physician collaborations are okay
  - Many models to choose from…. lots of flexibility
  - Sham collaborations designed to collectively exert power over payors may be a problem
- There are lots of nuances, and counsel needs to guide the process from the beginning

Proskauer