

# Coping with Concentration: Mergers, COPAs, and Sumo Wrestlers

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# Pervasive Consolidation

- **TOTAL:** 1299 mergers (\$387 billion) in health sector (2014)
- **Hospitals**
  - 80% of MSAs are highly concentrated
  - Average of 3.2 independent hospitals per market
- **Insurers**
  - Top 4 Insurers: 83% (2014)[*caveat:* Blues treated as 1)
    - Top 2 insurers >50% of business in 46 states
    - AMA: 3 out of 4 insurance markets “highly concentrated”
- **Physicians**
  - Increased concentration in physician specialty services
  - Extensive *vertical* integration by hospitals acquiring PCP and specialty practices.

# Why Mergers Matter

- **Price Increases**

- **Hospital** price increases >20% after mergers in concentrated markets
- **Insurance** premium increase of 7% following Aetna Prudential merger
- **Physician** prices for common procedures: 8-26% higher in less competitive markets

- **Quality**

- Studies show little/no positive effects on quality in concentrated provider markets

- **Econ.Studies:** Provider leverage leading cause of high costs.

# Hospital merger history...

Before 1994: **win**  
some, **lose** some



Start  
of the  
lean  
years

What  
went  
wrong?

AHA!!!

California v. Sutter (2001)

FTC v. Tenet (1999)

U.S. v. LIJMC (1997)

U.S. v. Mercy Health (1997)

FTC v. Butterworth (1997)

FTC v. Freeman (1995)

FTC v. Lee County (1994)

FTC v. Columbia Hosp.  
(1994)

FTC v. Adventist Health (1994)

FTC v. University Health  
(1991)

U.S. v. Rockford Mem'l  
(1990)

U.S. v. Carilion (1989)

HCA v. FTC  
(1986)



FTC v. St. Luke's (2015)

FTC v. ProMedica (2014)

FTC v. Phoebe Putney (2013)

FTC v. Reading (2012)

FTC v. Renown Health (2012)

FTC v. OSF Rockford (2012)

FTC v. Inova (2008)

FTC v. Evanston (2008)

1985

1990

1994

2001

2005

2010

2015

# FTC Files 3 Hospital Merger Cases in December 2015

- Penn State Hershey/Pinnacle Health
  - FTC LOSES in dist. Court: WINS in 3d Circuit
- Advocate Health Network/Northshore University
  - FTC LOSES in District Court: WINS in 7<sup>th</sup> Circuit
- Cabell Huntington/St. Mary's
  - FTC waives the white flag after W.Va adopts COPA law

# FTC v. Penn State Hershey Med. & PinnacleHealth System

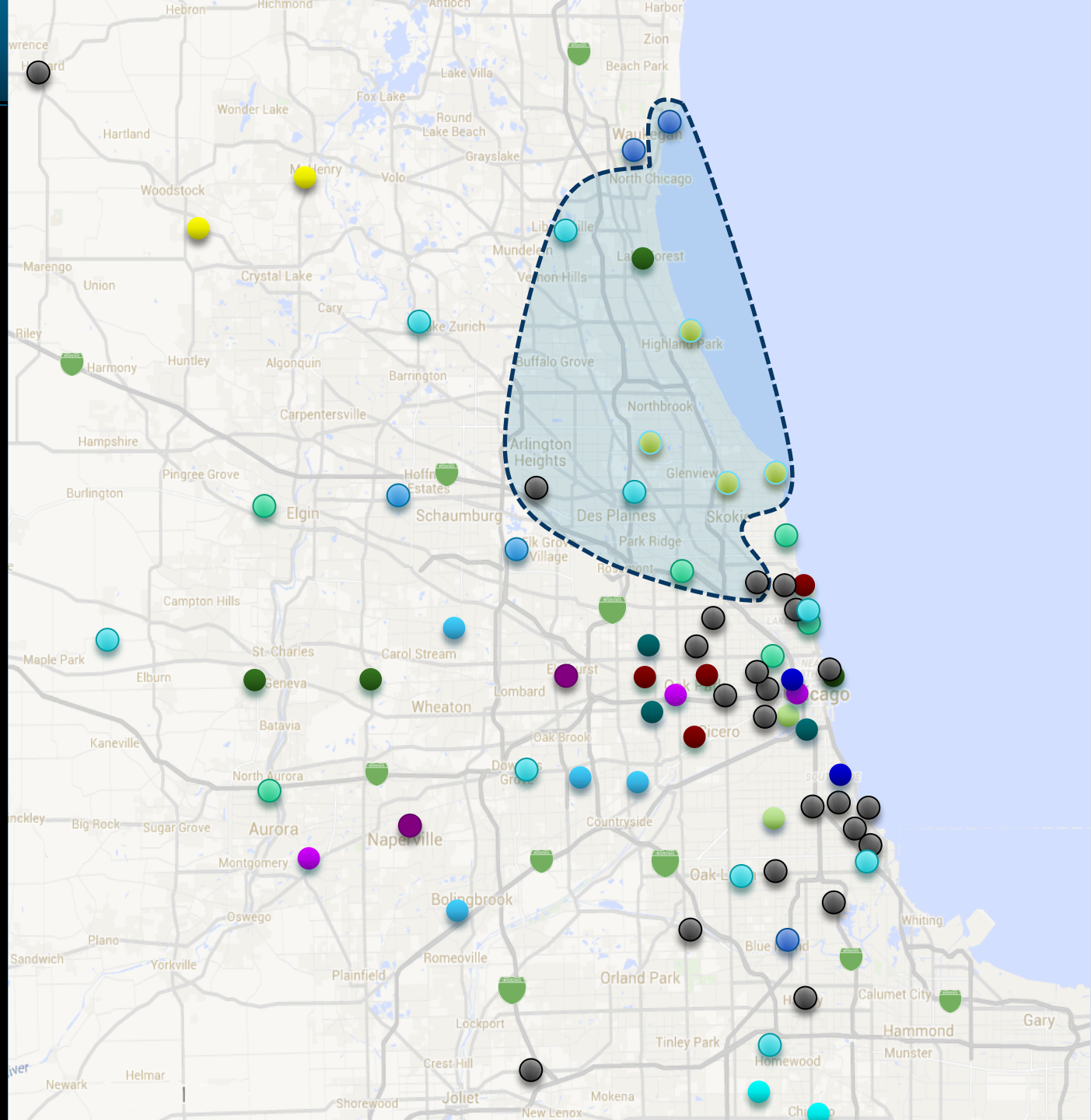
- District Court:
  - *Our determination reflects the healthcare world as it is, and not as the FTC wishes it to be. We find it no small irony that the same federal government under which the FTC operates has created a climate that virtually compels institutions to seek alliances such as the Hospitals intend here.”*
  - *OUR determination reflects the healthcare world as it is, not as the FTC wishes it to be.*
  - 44% of Hershey’s patients travel to Hershey; if prices rise they will turn to local hospitals: HENCE, LARGE GEOGRAPHIC MARKET

# FTC v. Penn State Hershey: Appeal

- Third Circuit
  - Lower court relied on outdated “patient flow” methodology (Elzinga Hogarty test)
  - Committed the “Silent Majority” Fallacy
    - Because some people travel doesn’t prove others will
  - Two stage market for health care
    - Competition to be included in networks
      - Price negotiation between payers and hospitals
    - Competition among network hospitals
      - Mostly on quality, reputation, amenities



# FTC's Geographic Market





# FTC v. Advocate/NorthShore

- 7<sup>th</sup> Circuit finds district court geographic market analysis “clearly erroneous”
  - Focus should have been merger’s effect on *payors*
    - Bargaining leverage: Payors could never exclude Advocate & NorthShore from their networks
- Bottom line, post 3<sup>rd</sup> & 7<sup>th</sup> Circuit decisions:
  - Market definition will focus on effect on payers
  - Strong judicial affirmation of SSNIP test, 2-stage market analysis. Payer testimony very important
  - Acute care hospital markets are local
  - Little room for efficiency claims for dominant hospitals

# Regulation to the Rescue: Certificate of Public Advantage Law

- Approximately 20 states have enacted COPAs
  - Most in disuse
- Substitute regulation of hospital rates, etc for competition
- State action doctrine: State law that
  - affirmatively express intent to displace competition &
  - actively supervise conduct
  - **Immunize** mergers & JVs from federal antitrust law
- Vehement FTC opposition
  - Avuncular letters to state legislatures: Largely ignored
  - In RED STATES!

# COPAs: FTC Waives the White Flag

- FTC challenge to Cabell/St. Mary's hospital merger in West Virginia
  - State passes COPA law
    - WVA Authority and Attorney General given authority to regulate: freeze prices, bar future acquisitions, etc
    - Kitchen sink standard: cost, access, quality, education, etc.
  - FTC abandons its challenge
- Tennessee and Virginia COPAs
  - Proceeding in BOTH states re: Wellmont/Mountain States merger
  - FTC participated in COPA hearings; 46 economists also

# Physician Acquisitions

- So far, only cases involved horizontal mergers
  - FTC v. St. Lukes (9<sup>th</sup> Cir) Idaho:
    - hospital employing primary care docs acquires another PCP group, giving it 80% of all PCPs
    - Court rejects “ACA made me do it’ defense
    - Very local market (Nampa ID) for primary care
    - Ease of entry defense rejected: young MDs don’t want Nampa
- Specialty merger cases: FTC v. Renown Health
  - Hospital with large number of cardiologist acquires more
    - 15 or 16 in the market

# Hospital Acquisitions of Physician Practices

- Vertical analysis: distinct under antitrust
  - E.g. Hospital acquires large number of orthopedic surgeons
  - Harm is foreclosure: Other hospitals can't effectively compete in orthopedic surgery market
  - Alleged by rival hospitals, but not decided, in St. Luke's
  - FTC on the hunt for a case?
- Defenses: ease of entry, efficiencies, countervailing power
- *Navigating through the Fog...* (Greaney & Ross 91 U. Wash L.Rev 199)

## INSURANCE MERGERS

**aetna**<sup>™</sup>

**Humana**

**Anthem**<sup>®</sup>



**Cigna**<sup>®</sup>



**UnitedHealthcare**<sup>®</sup>

# Insurance Mergers:

## Aetna/Humana & Anthem/Cigna

- Combination of 4 of the “Big 5” commercial insurers
- Multiple *product markets*
  - Medicare Advantage (Aetna/Humana)
  - National Accounts Self insured/ASO (Anthem/Cigna)
  - Large group market (Anthem/Cigna)
  - Exchanges (Aetna/Humana)
- Hundreds of local *geographic markets*
- *Increased Concentration* (600 Markets??)
- *Relief* : Prior DOJ cases: divestitures, NOT prohibition
  - Aetna to divest plans in 350 markets to Molina
- *Missouri Dept of Insurance*: Disapproves Aetna/Humana
  - Small group, Medicare Advantage and individual



# Justifications/Defenses: The Sumo Wrestler Theory



# Evidence re: Larger Payers' Bargaining Leverage

- Distinguish **monopsony**
  - Large buyer v. fragmented provider market
    - Higher prices to consumers; lower quality
- *from* **countervailing power**
  - Large insurer securing discounts from dominant provider
    - Lower premiums? Not necessarily
- Economic studies: Large insurers **DO** secure larger discounts from providers
- More studies: Dominant providers are leading cause of high health costs and insurance premiums
- **BUT**: Large insurers **do not pass on** cost savings to consumers in reduced premiums

# Strategic & Coerced Accommodation

- Dominant insurers bargaining with dominant providers have found *strategic* solution: Mutual accommodation
  - *Boston Globe: A Handshake That Made Healthcare History*
  - Leavitt, *Freakenomics*: Collusion among Sumo Wrestlers
- Other instances where insurers have coerced accommodation from providers
  - Most Favored Nations cases

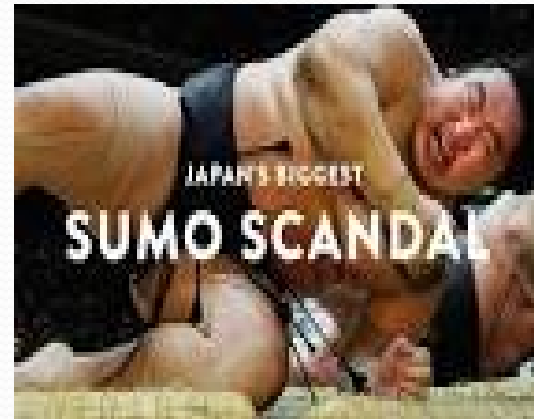
# Sumo Wrestlers May “Cooperate”

## *Sumo 'fixing' scandal rocks Japan*

CNN February  
4, 2011

## *In Text Messages, Signs of a Rigged Sumo Fight*

NYTimes  
<http://www.nytimes.com/2011/02/05/world/asia/05sumo.html>



# Regulation & The “ACA Made Me Do It” Defense

- Impetus to consolidate comes from the ACA
  - Defense rejected by courts
- “Soft immunity” Is regulation an effective substitute for antitrust
- MLR/Rate regulation?
  - Self-insured plans not covered
  - “Gameable”
  - Doesn’t control monopoly pricing



# Another Defense, Efficiencies: What to Make of Integration?

- Defense:
  - Improved quality, better care, resulting from integrated care justifies monopoly pricing
- Case law
  - Efficiencies must be
    - Merger specific (achievable only by merger)
    - Cognizable
    - Not speculative
- Hard Question: *FTC v. St. Luke's*
  - Can Courts meaningfully “weigh” efficiency v. monopoly

# Aetna/Humana trial

- Two issues predominate
  - Is Medicare Advantage a separate market
    - i.e. distinct from FFS?
    - If DOJ loses on this issue, catastrophic for MA competition
      - In many regions insurers could merge to 100% of MA
  - Is the divestiture to Molina Health Care sufficient?
    - Molina is a Fortune 500 Company specializing in Medicaid managed care



# Plan Divestitures as a Remedy: A Bridge Too Far?



# Problems with Spin-Offs

- **Insurance Plan Spin Offs** in Antitrust Merger Cases
  - Must find buyers that are:
    - Capable
    - Not themselves a problem
    - Able to maintain favorable provider contracts
  - Need for administrative/judicial supervision
  - Practical? Dozens of buyers?
  - Economic study: Buyers of plans fail!

# Really Integrated Care



# Looking Ahead: President Trump and Antitrust Enforcement

- Trump as plaintiff
  - USFL v. NFL
- Trump as defendant
  - Alleged monopolization of the Atlantic City casino market
  - Fined for violations of Hart-Scott merger reporting requirements

