

When Hospitals Stop Playing Operation and Start Playing Monopoly: The Potential for Antitrust Violations in Memphis with Hospitals Acquiring Physician Groups

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I. INTRODUCTION	675
II. WHAT LED TO THE CURRENT STATE OF THE MEDICAL MARKET AND THE TREND OF MERGERS AND ACQUISITIONS	679
A. <i>The Losing Streak of the FTC and How it has Changed Course</i>	680
B. <i>The Affordable Care Act's Push for Coordination of Care</i>	683
III. RECENT ACTIONS BY THE FTC AND APPLYING THE CLAYTON ACT	684
A. <i>The FTC's Challenge Against St. Luke's and the Consequences of the Outcome</i>	687
B. <i>Other Significant Vertical Integration Challenges</i>	689
1. <i>Providence Health's Failed Attempt</i>	690
2. <i>Renown Health's Settlement with the FTC</i>	691
IV. APPLYING THE LESSONS LEARNED TO MEMPHIS, TENNESSEE	692
A. <i>Potential for Antitrust Violations for Hospitals Acquiring Physicians in Memphis</i>	693
B. <i>Alternatives to Acquiring Physician Groups</i>	696
V. CONCLUSION	697

I. INTRODUCTION

The public views the recent trend of hospitals acquiring physician practices as mostly a positive. The goal of integrating

primary care physicians and specialists into one health system has many benefits, including, minimizing repetitive testing and helping physicians make informed diagnoses through the sharing of electronic medical records, both of which will improve the quality and safety of healthcare.¹ This trend has been accelerated by the Patient Protection and Affordable Care Act's ("ACA") effort to coordinate care.² However, as these health systems grow, the potential for concentration in the market increases, and concerns are emerging regarding the adverse effects of the push for integrated health systems.³ When one large health system includes a substantial share of a city's family practice physicians or a specialty group, antitrust concerns are raised.⁴ This practice monopolizes care and providers into one large system, which adversely affects competition.⁵ Without competition in the marketplace, hospitals are more likely to charge higher prices and negotiate higher rates with

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1. See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., ACCOUNTABLE CARE ORGANIZATIONS & YOU: FREQUENTLY ASKED QUESTIONS (FAQS) FOR PEOPLE WITH MEDICARE 4 (2015), <https://www.medicare.gov/Pubs/pdf/11588.pdf>.

2. 42 U.S.C. § 1395jjj (2012). The ACA encourages forming Accountable Care Organizations ("ACOs") as a way to coordinate care. *Id.* ACOs are defined as, "groups of doctors, hospitals, and other health care providers, who come together voluntarily to give coordinated high quality care . . ." *Accountable Care Organizations (ACO)*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ACO/index.html?redirect=/Aco> (last updated Jan. 6, 2015, 2:58 PM).

3. See Laurence C. Baker et al., *Vertical Integration: Hospital Ownership of Physician Practices is Associated with Higher Prices and Spending*, HEALTH AFF. 756, 756 (2014) (finding that vertical integration incentivized by the ACA led to increased prices and spending by hospitals). An integrated health system is a health system that provides "primary care, specialty care, and hospital care" through coordination of services. H.R. 5544, 110th Cong. (2008).

4. See Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 871-78 (2011).

5. See *id.* (arguing that mergers and ACOs lead to monopolization of the healthcare market and should be scrutinized more strictly).

insurance companies, resulting in an outcome that conflicts with the goals of the ACA.⁶

The increasing concern of the anti-competitive aspects of the acquisitions of physician practices has led to antitrust actions across the country.⁷ The Federal Trade Commission (“FTC”) has held strong to its commitment to pursue these antitrust violations in the healthcare arena through the enforcement of Section 7 of the Clayton Act.⁸ The FTC enforces Section 7 of the Clayton Act to prohibit mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.”⁹ Although at first it might appear that the ACA and the FTC have competing interests, the ACA’s promotion of coordinated care and the Clayton Act’s prevention of monopolization and anticompetitive outcomes can work collaboratively with balance.¹⁰

The FTC is particularly concerned about anti-competitive actions in vulnerable markets.¹¹ These markets are ripe for abuse by

6. See Robert Pear, *F.T.C. Wary of Mergers by Hospitals*, N.Y. TIMES, (Sept. 17, 2014), http://www.nytimes.com/2014/09/18/business/ftc-wary-of-mergers-by-hospitals-.html?_r=0 (“Hospitals often contend that the antitrust laws are at odds with the goals of the Affordable Care Act because they limit the ability of doctors and hospitals to join forces and collaborate. Federal officials see no conflict.”). For an interesting comparison of the potential problems that can occur as a result of current hospital growth and the collapse of banks in 2008, see Tim Xu et al., *The Potential Hazards of Hospital Consolidation: Implications for Quality, Access, and Price*, 314 J. AM. MED. ASS’N, 1337, 1338 (2015).

7. For information on the recent cases by the FTC, see Lisa Jose Fales & Paul Feinstein, *How to Turn a Losing Streak into Wins: The FTC and Hospital Merger Enforcement*, 29 Antitrust A.B.A. 31, 31–36 (2014).

8. 15 U.S.C. § 18 (2012). Section 7 of the Clayton Act is also enforced by the Department of Justice through state attorney generals. *Id.*

9. *Id.* Although these actions are also challenged by state agencies, private actors, and the DOJ, this note will focus on challenges by the FTC that are the most applicable to hospitals buying physician practices in Memphis.

10. See Julie Brill, Comm’r, Fed. Trade Comm’n, Keynote Address at the 2014 Hal White Antitrust Conference 6–11 (June 9, 2014) [hereinafter Brill Keynote],

https://www.ftc.gov/system/files/documents/public_statements/314861/140609halwhite.pdf. Brill states that the goals of the ACA and the FTC are aligned and notes that the ACA does not specifically promote mergers and acquisitions as the preferred form of creating ACOs. *Id.* at 9–11.

11. See Julie Brill, *Competition In Health Care Markets*, HEALTH AFF. BLOG (Jan. 26, 2015), <http://healthaffairs.org/blog/2015/01/26/competition-in-health-care-markets/> [hereinafter Brill]. Brill is the commissioner of the FTC. In

monopolistic hospitals that use the ACA as a cover.¹² This concern is pertinent in Memphis, Tennessee, because the market is vulnerable to concentration.¹³ In Memphis, two large hospital systems employ or contract with the majority of the physicians in the area.¹⁴ If one of these systems were to acquire a large specialty practice group, there would certainly be antitrust concerns.¹⁵ As of May 2015, hospitals or other physician groups in Memphis acquired eleven of the twenty-five largest physician groups.¹⁶ Two large area hospitals were responsible for seven of the eleven acquisitions.¹⁷ Memphis is also home to a smaller hospital system that will eventually suffer the adverse consequences of continuous acquisitions by its larger competitors.¹⁸ When the other competitors hold a large share of the market, the smaller hospital system will be forced out of that market all together. This practice will further hinder competition and patient access to providers.

This Note will recommend that hospitals in Memphis examine future acquisitions of physician groups in light of the recent FTC actions across the nation and the current state of the market in the city, while also considering other options for meeting the goals

this blog post, she claims that the ACA is not a “free pass” for mergers to escape the grasp of the FTC, and she reiterates the FTC’s recent successful challenges against such mergers and acquisitions. *Id.*

12. David W. Simon & H. Holden Brooks, *Federal Antitrust Enforcement in Health Care*, ASSOCIATION OF CORPORATE COUNSEL (Jan. 03, 2012), <http://www.acc.com/legalresources/quickcounsel/faeihc.cfm> (providing an overview of antitrust in healthcare).

13. See Jason Bolton, *Practice mergers continue, but hospital acquisitions slowing*, MEMPHIS BUS. J. (May 22, 2015, 5:00 AM), <http://www.bizjournals.com/memphis/print-edition/2015/05/22/practice-mergers-continue-but-hospital.html>.

14. *Id.*

15. For example, as of 2015, a specialty practice was tied with a hospital owned physician group for the second largest physician practice in Memphis. *Id.*

16. *Id.* (discussing a report by Deloitte Center for Health Solutions published in 2013 and concluding that “hospitals acquiring physician practices” is on trend with the local market in relation to a peak of mergers and acquisitions in 2011).

17. *Id.* In 2011 alone, the two large systems grew by eighty new physicians from acquiring twelve practices collectively. *Id.*

18. For an overview of the hospitals in Memphis, Tennessee, see *Area Hospitals*, MEMPHIS MED. SOC’Y, <http://www.mdmemphis.org/index.php/info-resources/area-hospitals/> (last visited Mar. 3, 2017).

of the ACA. Part II of this Note will consider the history leading to the recent antitrust cases and the state of the medical market at this time. It will demonstrate how the ACA helped to fuel the changes in healthcare systems, including collaboration through mergers and acquisitions. Part III will give an overview of the antitrust law involved in vertical integration and the cases across the United States. Part IV will focus on the potential for antitrust violations in Memphis and how hospitals can avoid actions by the FTC. It will also look at alternatives to acquiring physician practices in the city. Considering the recent history of aggressive antitrust prosecutions, Memphis hospitals wishing to expand their market share should seek alternatives beyond pure acquisition.

II. WHAT LED TO THE CURRENT STATE OF THE MEDICAL MARKET AND THE TREND OF MERGERS AND ACQUISITIONS

The two biggest factors that provided for the state of the healthcare industry today are the history of previous consolidation efforts and the enactment of the ACA. The combination of learning from decades of past mistakes and the enactment of new legislation has had a direct impact on the recent antitrust actions as the nation moves toward growth through mergers and acquisitions. The present trend towards consolidation in the healthcare industry may give a sense of déjà vu to those who remember the healthcare market in the 1990s. From the mid-1990s to the early 2000s, hospitals rapidly grew through mergers and acquisitions.¹⁹ The Department of Justice (“DOJ”) and the FTC had a long and successful reign combating these mergers and acquisitions. But this success ended in the early 2000s, as courts began to favor defendants.²⁰

In addition to the shift in outcomes of government actions, a key factor in the shape of the current market was the passing of the ACA in 2011, which provided incentives to coordinate care.²¹ Although the ACA does not specifically advocate for mergers or acquisitions, those particular practices have been some of the most

19. Brill Keynote, *supra* note 10.

20. See, e.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278 (7th Cir. 1990).

21. See Press Release, Ctrs. for Medicare & Medicaid Servs., New Affordable Care Act Initiative to Support Care Coordination Nationwide (Oct. 15, 2014) <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2014-Press-releases-items/2014-10-15-3.html>.

popular forms of coordination and integration.²² Medical providers are using the ACA as a shield from FTC action when growing through mergers and acquisitions, though their actual purpose is to gain bargaining power with insurance companies and other providers.²³ Once medical providers gain a monopoly, they use this power to raise prices in their market. These providers are leaning on coordination under the ACA to justify the mergers and acquisitions; however, there are many ways to coordinate care without a full merger or acquisition.

A. The Losing Streak of the FTC and How it has Changed Course

In the 1980s and early 1990s, the FTC and DOJ were successful in most of their challenges against healthcare mergers.²⁴ However, in the mid-1990s to the early 2000s, the FTC and the DOJ lost six consecutive cases challenging healthcare mergers.²⁵ After this losing streak, they took a break from challenging mergers and acquisitions in the healthcare arena.²⁶ The FTC stated that during this time that they reflected on the prior losses and examined the results of the market competition after these providers were allowed to continue with their deals.²⁷ The FTC blamed the negative

22. Leemore Dafny, *Hospital Industry Consolidation—Still More to Come?*, 370 NEW ENG. J. MED. 198, 198–99 (Jan. 16, 2014), <http://www.nejm.org/doi/full/10.1056/NEJMp1313948>.

23. See Brill, *supra* note 11.

24. Edith Ramirez, Chairwoman, Fed. Trade Comm'n, *Retrospectives at the FTC: Promoting an Antitrust Agenda 2* (June 28, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/retrospectives-ftc-promoting-antitrust-agenda/130628aba-antitrust.pdf.

25. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995); *Ukiah Adventist Hosp. v. FTC*, No. 93-70387 (9th Cir. May 18, 1994); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996); *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated*, 107 F.3d 632 (1997) (the 8th Cir. vacated the district court's judgment for mootness when defendants abandoned the proposed merger). A seventh loss against a healthcare merger was suffered by the state government in California during this period. *State of California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057 (N.D. Cal. 2000).

26. Brill Keynote, *supra* note 10, at 1.

27. *Id.* at 2; Ramirez, *supra* note 24. At a 2013 symposium, Ramirez called the FTC's healthcare retrospective project "perhaps the most prominent of the FTC's retrospective efforts to date" before giving an overview of the project. *Id.*

outcomes on the courts' reliance on faulty reasoning raised by the defendants in each case.²⁸ This retrospective analysis has seemingly led to a new era of the FTC in healthcare.

In those six cases, courts found that the mergers and acquisitions were not anticompetitive against the government's assertions. Courts mostly relied on reasoning that patients would travel for medical care if local providers raised prices as a result of their market power.²⁹ The courts also believed that nonprofit hospitals and providers would use the market power they gained in positive ways or not at all.³⁰ From the studies performed through the retrospective review, the FTC and the DOJ gathered that nonprofit, as well as for-profit, hospitals are likely to use their post-merger size to gain bargaining power and raise prices.³¹ Using this

28. See Ramirez, *supra* note 24, at 3.

29. See *Tenet Health Care*, 186 F.3d at 1052–54 (relying on sixty-five mile radius geographic market proposed by defendants in lieu of the FTC's proposed fifty-mile radius that the district court favored); *Mercy Health*, 902 F. Supp. at 980–984 (reasoning that patients do have incentives to travel for medical treatment when prices are increased as a result of changes in coverage of insurance); see also Ramirez, *supra* note 24, at 2 (calling the arguments courts relied on questionable). Ramirez noted that the model used to assess the market during this time did not consider other reasons for patients traveling for healthcare, such as seeking services not available in their market. *Id.* at 3. She also noted that the model failed to take into account that patients may not have a reason to seek less expensive healthcare providers because most patients do not pay directly for healthcare. *Id.*

30. See *Butterworth*, 946 F. Supp. at 1298. The *Butterworth* court is especially lenient on nonprofit hospitals, citing evidence that nonprofits with high market shares will lower prices instead of raising them. *Id.* at 1295. For an analysis of how courts' views of nonprofits using their market share was incorrect, see *Patient Protection and Affordable Care Act, Consolidation, and the Consequent Impact on Competition in Healthcare: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. On the Judiciary*, 113th Cong. 37 (2013) (statement of Barak D. Richman, Bartlett Professor of Law and Business Administration, Duke Law School). After providing his analysis, Richman states, "The foregoing observations should finally dispel any impression that nonprofit hospitals, as community institutions, can safely be allowed to possess market power on the theory that, as nonprofits, they can be trusted not to exercise it." *Id.* at 41.

31. JOSEPH FARRELL ET AL., *ECONOMICS AT THE FTC: RETROSPECTIVE MERGER ANALYSIS WITH A FOCUS ON HOSPITALS*, 19 (2009), https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-retrospective-merger-analysis-focus-hospitals/farrelletal_rio2009.pdf; Ramirez, *supra* note 24, at 4. Farrell provides a review of the FTC's Bureau of Economics

knowledge, the FTC brought an action against a nonprofit healthcare corporation four years after a merger occurred.³² In that case, the FTC relied on evidence of the hospital's post-merger practices of using increased bargaining power to raise prices to prove the anti-competitiveness of the merger.³³ The FTC ultimately prevailed in this case, ending its losing streak and giving it room to challenge present day mergers and acquisitions in the healthcare field.³⁴ The FTC was able to prove the anti-competitive effects of this merger and study the effects of the mergers in the cases it lost.³⁵ Through this retrospection, the FTC had strong evidence moving forward of the negative outcomes that healthcare mergers have on the market

results of the study of four hospital mergers and their post merger effects on the market. FARRELL at 19. The FTC stated the goal of the studies was to “identify potential targets of FTC enforcement actions[] and better . . . inform the FTC ‘about the consequences of particular transactions and the nature of competitive forces in health care.’” *Id.* at 10 (citing Timothy J. Muris, Chairman, Fed. Trade Comm’n, Everything Old Is New Again: Health Care and Competition in the 21st Century, 7th Annual Competition in Health Care Forum 19–20 (Nov. 7, 2002)).

32. *In re Evanston Nw. Healthcare*, Nos. 07-CV-4446, 07-CV-4523, 07-CV-5275, 08-CV-2343, 08-CV-2658, 2008 WL 2229488, at *2 (N.D. Ill. May 29, 2008) (involving a nonprofit hospital system merger that occurred in 2000 in Chicago, Illinois); *see also* Answering and Cross-Appeal Brief of Complaint Counsel at *1, *In re Evanston Nw. Healthcare*, Nos. 07-CV-4446, 07-CV-4523, 07-CV-5275, 08-CV-2343, 08-CV-2658, 2008 WL 2229488 (N.D. Ill. May 29, 2008). There is no dispute concerning what happened following the merger. ENH raised the prices it charged managed care organizations . . . , and the economic experts for both Complaint Counsel and Respondents agreed that those prices increased by more than the price increases of the other groups of hospitals in the Chicago area studied by either sides’ experts. Brief of Complaint Counsel, *In re Evanston*, 2008 WL 2229488, at 1.

33. *In re Evanston*, 2008 WL 2229488, at *5–6. The administrative law judge ordered the typical remedy of divestiture, but because the case was brought so long after the merger, the full commission rejected that proposal on appeal. *Id.* at *2. The final order required the hospital to have each of the hospitals that merged negotiate separately in the future, hoping this would provide relief for the anti-competitiveness that arose out of merger. *Id.*

34. *Id.* at *7; *see also* Press Release, Fed. Trade Comm’n, FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporations Acquisition of Highland Park Hospital (April 28, 2008), <https://www.ftc.gov/news-events/press-releases/2008/04/ftc-issues-final-opinion-and-order-restore-competition-lost>.

35. Ramirez, *supra* note 24, at 9–10.

and evidence that the reasoning relied on in the previous cases was faulty.³⁶

B. The Affordable Care Act's Push for Coordination of Care

In addition to the shift in outcomes of governmental actions, another source of the change in today's healthcare market is the recent passing of the ACA.³⁷ The ACA provides incentives for creating health networks called accountable care organizations ("ACOs") through the Medicare Shared Savings Program.³⁸ The goal of ACOs is to promote coordination of care, which to many, means consolidation.³⁹ With an emphasis on quality care, ACOs join multiple levels of care into one large, team-based approach where all providers communicate with each other.⁴⁰ For example, a

36. *Id.* at 2, 9–10.

37. 42 U.S.C. § 1395jjj (2013). The ACA was enacted in 2010 and upheld by the Supreme Court in *National Federation of Independent Business v. Sebelius* in 2012. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 US 519 (2012). For more information about the ACA, visit <http://www.hhs.gov/healthcare/about-the-law/read-the-law/index.html>.

38. 42 U.S.C. § 1395jjj (2013). "The goal of coordinated care is to ensure that patients, especially the chronically ill, get the right care at the right time, while avoiding unnecessary duplication of services and preventing medical errors." *Accountable Care Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ACO/index.html?redirect=/Aco> (last updated Jan. 6, 2015); *see also*, *Shared Savings Programs*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/index.html?redirect=/sharedsavingsprogram> (last updated Jan. 18, 2017). Shared Savings Programs provide incentives for ACOs that meet certain quality standards while lowering healthcare costs. *Id.* The ACOs are provided a safe harbor by the FTC if they hold less than thirty percent of the primary service area. Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67,026 (Oct. 28, 2011).

39. *See* Katherine Baicker & Helen Levy, *Coordination Versus Competition in Health Care Reform*, 369 NEW ENG. J. MED. 789 (2013), <http://www.nejm.org/doi/full/10.1056/NEJMp1306268#t=article>.

40. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., ACCOUNTABLE CARE ORGANIZATIONS & YOU: FREQUENTLY ASKED QUESTIONS (FAQS) FOR PEOPLE WITH MEDICARE 1 (2015), <https://www.medicare.gov/Pubs/pdf/11588.pdf>. One of the healthcare problems in the 1990s was the pushback against health maintenance organizations ("HMOs") and managed care providers, but unlike those types of coordination, ACOs do not limit a patient's choice of provider. *Id.* at 2; *see generally*, Paul B. Ginsburg, *Competition in Health Care: Its Evolution*

hospital in Memphis would coordinate with local specialists and primary care physicians in an ACO to provide all levels of care to patients and share information through electronic medical records with all providers. By coordinating treatment, providers can eliminate repeat testing and prescribing.

An ACO can be formed through affiliations, partnerships, or other avenues, but the most popular form of consolidation since the enactment of the ACA has been through mergers and acquisitions.⁴¹ Mergers and acquisitions in healthcare peaked in 2012 and have since been slightly declining due, in part, to the recent actions by the FTC and DOJ.⁴² While the ACA pushes for consolidation and integration among healthcare providers, the FTC and DOJ are fighting against the anti-competitive outcomes this can have on the market.⁴³

III. RECENT ACTIONS BY THE FTC AND APPLYING THE CLAYTON ACT

In light of the history of FTC and DOJ challenges, along with the redirection and legislation of the ACA, the FTC has now begun fighting anticompetitive mergers in healthcare. There are two types of mergers and acquisitions happening in healthcare, vertical and horizontal. A vertical acquisition occurs when a buyer purchases another type of provider that is not a direct competitor,⁴⁴ and a

Over The Past Decade, 24 HEALTH AFF. 1512 (2005) (analyzing the reason for failed mergers in the 1990s and the reasons managed care plans did not work).

41. See Suzanne F. Delbanco, *Medical Mergers Are Driving up Health Costs*, WALL STREET J. (Sept. 30, 2014, 7:19 PM), <http://www.wsj.com/articles/suzanne-f-delbanco-medical-mergers-are-driving-up-health-costs-1412119178> (discussing ACOs leading to mergers and meeting the goals of the ACA without mergers).

42. See PRICEWATERHOUSECOOPERS, LLP, US HEALTH SERVICES DEALS INSIGHTS: ANALYSIS AND TRENDS IN US HEALTH SERVICES ACTIVITY 2013 AND 2014 OUTLOOK 3, 13 (2014), <http://www.pwc.com/us/en/healthcare/publications/assets/pwc-health-services-deals-insights-2013.pdf>.

43. Brill, *supra* note 11.

44. Steven C. Sunshine, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Vertical Merger Enforcement Policy (Apr. 5, 1995).

horizontal acquisition occurs when two direct competitors merge.⁴⁵ For example, a hospital acquiring or merging with another hospital is a horizontal merger because they are direct competitors.⁴⁶ But, a hospital acquiring a physician practice is a vertical merger because those types of providers are not direct competitors.⁴⁷ Another term for the practice of growing through vertical mergers and acquisitions is vertical integration.⁴⁸ The FTC has not only been bringing actions against healthcare mergers and acquisitions, but they have also been prevailing in their challenges.⁴⁹ Most of the challenges by the FTC have been against horizontal mergers, or mergers where two direct competitors join.⁵⁰ However, the FTC is expected to take action against vertical mergers in the future and, in fact, has already successfully challenged a semi-vertical healthcare merger.⁵¹

45. See *Competitive Effects*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects> (last visited Mar. 4, 2017).

46. See *id.*

47. See *id.*

48. See Baker, *supra* note 3, at 756. Vertical integration also includes other types of integration such as contractual relationships with other levels of care. *Id.* at 762.

49. See, e.g., Joint Motion to Dismiss Complaint, Inova Health Sys. Found. & Prince William Health Sys., Inc., Docket No. 9326, (Fed. Trade Comm'n Jun. 11, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/06/080611jointmოდисmisscmplt.pdf>; Order Dismissing Complaint, Reading Health Sys. & Surgical Inst. of Reading, Docket No. 9353 (Fed. Trade Comm'n Dec. 7, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121207readingsircmpt.pdf>.

50. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

51. Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., 778 F.3d 775 (9th Cir. 2015). St. Luke's was first challenged as a vertical merger; the FTC then joined and won the case under a horizontal merger theory. *Id.* at 782, 793. However, this was a case of a hospital buying a physician practice. *Id.* at 781. Government agencies have stated their intentions to pursue vertical mergers more vigorously than in the past. See Sunshine, *supra* note 44; Memorandum from Skadden, Arps, Slate, Meagher & Flom LLP, FTC Wins Action To Block Hospital-Physician Group Merger (Feb. 3, 2014) [hereinafter Skadden Memorandum],

All of the actions by the FTC and DOJ are brought under Section 7 of the Clayton Act, alleging that the healthcare consolidation transaction will promote anti-competitiveness or create a monopoly.⁵² Under the Clayton Act, the plaintiff has the burden of establishing a prima facie case by proving that the merger will lessen competition.⁵³ To meet this burden, the plaintiff must examine the relevant product market both geographically and in relation to the product.⁵⁴ Parties in this context often dispute the extent of the geographic market.⁵⁵ Courts use a test that examines hypothetical price increases to test the size of the relevant geographic market.⁵⁶ The test attempts to measure how many buyers would purchase healthcare services outside of the market if a monopolist company made a “small but significant nontransitory increase in price,” or SSNIP.⁵⁷ Under the SSNIP test, if too many buyers would leave the market to purchase services as a result of the price increase, then the relevant geographic market used for analysis should be larger.⁵⁸ Because courts have used this test in some of the

https://www.skadden.com/sites/default/files/publications/FTC_Wins_Action_to_Block_Hospital-Physician_Group_Merger.pdf.

52. 15 U.S.C. § 18 (2013).

53. *St. Luke's*, 778 F.3d at 783. The Ninth Circuit explains the standards of proof in *St. Luke's*:

Section 7 claims are typically assessed under a “burden-shifting framework. . . .” The plaintiff must first establish a prima facie case that a merger is anticompetitive. . . . The burden then shifts to the defendant to rebut the prima facie case. . . . “[I]f the [defendant] successfully rebuts the prima facie case, the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times.”

Id. (citations omitted).

54. *Id.* at 783–84.

55. *See, e.g., id.* at 785 (defendant disputing erred in determining the geographical market).

56. *Id.* at 784–85; *see also* John D. Harkrider, *Operationalizing the Hypothetical Monopolist Test*, U.S. DEP'T OF JUSTICE, ANTITRUST DIV., <http://www.justice.gov/atr/operationalizing-hypothetical-monopolist-test>. (last updated June 25, 2015).

57. *St. Luke's*, 778 F.3d at 784 (citing *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008)). A SSNIP usually means a five percent increase over two years. *See* John M. Newman, *Antitrust in Zero Price Markets: Applications*, 94 Wash. U. L. Rev. 49, 65 (2016).

58. *Id.*

recent healthcare merger cases, it is likely that it will be used in future cases challenging mergers; however, there are other ways for a plaintiff to prove that a merger will lessen competition.

A. The FTC's Challenge Against St. Luke's and the Consequences of the Outcome

The most relevant case to this discussion is the FTC's recent challenge to St. Luke's Health System's ("St. Luke's") acquisition of Saltzer Medical in Nampa, Idaho.⁵⁹ This case is pertinent because it expanded the FTC's recent challenges to include a victory that prevented the vertical integration of a hospital acquiring a physician group.⁶⁰ Private parties filed for a preliminary injunction to stop the merger from proceeding, but their challenge was denied in district court.⁶¹ After this first loss, the FTC joined the plaintiffs to file for another injunction against the merger.⁶² The district court sided with the FTC, and this decision was affirmed in the Ninth Circuit.⁶³

The district court utilized the SSNIP test to determine the relevant geographic market, which was challenged by St. Luke's on appeal to the Ninth Circuit.⁶⁴ The geographic market was determined to be Nampa, and the district court considered hypothetical results of a monopoly on primary care physicians in the area if a SSNIP occurred.⁶⁵ The lower court relied on testimony from residents of Nampa to determine that, in the hypothetical, residents "strongly prefer" to not travel outside of the relevant geographic market and that insurance providers would need to include the primary care physicians within the monopoly in their

59. *Id.* at 775.

60. *Id.* at 792–93; Skadden Memorandum, *supra* note 51.

61. *St. Luke's*, 778 F.3d at 782.

62. *Id.*

63. *Id.* at 792–93; *see also* Jonathan L. Lewis et al., *In the Wake of the FTC's St. Luke's Victory in Idaho, What Does the Future Hold for Hospital-Physician Acquisitions?*, AMERICAN BAR ASSOCIATION HEALTH ESOURCE, http://www.americanbar.org/publications/aba_health_esource/2013-14/march/in_the_wake.html (last visited Mar. 4, 2017) ("[T]he court's finding clearly shows that the theory of harm articulated by the FTC in hospital merger cases—that a transaction can increase bargaining leverage with health insurance plans resulting in higher reimbursement—is fully applicable to physician acquisition cases. . . .").

64. *St. Luke's*, 778 F.3d at 784–85.

65. *Id.*

insurance plans, ultimately resulting in a price increase.⁶⁶ The court determined that the plaintiffs established a prima facie case by taking into account of the size of the market share, the potential for St. Luke's to negotiate higher rates with insurance companies, and the ability of St. Luke's to charge for services at higher hospital rates.⁶⁷ The Ninth Circuit, despite St. Luke's efforts to convince the court that they were complying with the ACA's efforts to coordinate care, affirmed these findings.⁶⁸ A hospital holding an eighty percent share of primary care physicians in a geographic market was monopolistic, no matter the good intentions or benefits of the merger.⁶⁹

The penalty in this case is noteworthy due to its harshness. The court ordered St. Luke's to divest itself of Saltzer, costing at least the goodwill amount that was paid to Saltzer at the start of the acquisition and the costs of separation.⁷⁰ The court noted that, while the hospital's intentions were good, the outcome would lessen competition.⁷¹ Significantly, the court stated that there are methods other than a merger or acquisition to achieve St. Luke's goal of coordination.⁷² The district court's order of divestiture was also upheld by the Ninth Circuit.⁷³ The Ninth Circuit did so despite St.

66. *Id.*

67. *Id.* at 786.

68. *Id.* at 793.

69. *See id.* at 791–92.

70. *Id.* at 793. St. Luke's also incurred over \$8 million in legal fees. Jeff Sistrunk, *Allied Denied \$8M Refund of St. Luke's FTC Defense Costs*, LAW 360 (Sept. 4, 2015, 10:00 PM), <http://www.law360.com/articles/699879/allied-denied-8m-refund-of-st-luke-s-ftc-defense-costs>. Additionally, Saltzer lost half of its surgeons due to the acquisition, making it difficult to operate alone. Finding of Fact and Conclusions of Law at *24, *Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys.*, Nos. 1:12-CV-00560-BLW, 1:13-CV-00116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014).

71. *See St. Luke's*, 778 F.3d at 791–93. It is estimated that the acquisition would have produced at least a thirty percent price increase under its contracts. Molly Gamble, *The St. Luke's Antitrust Case: 10 Things to Know*, BECKER'S HOSP. REV. (Jan. 30, 2014), <http://www.beckershospitalreview.com/legal-regulatory-issues/the-st-luke-s-antitrust-case-10-things-to-know.html>.

72. *See Gamble*, *supra* note 71; *see also* Skadden Memorandum, *supra* note 51; Lewis et al., *supra* note 63 (“[A]ffiliation models short of employing physicians after an acquisition need to be considered where a proposed deal is likely to raise competitive concern[.]”).

73. *St. Luke's*, 778 F.3d at 793.

Luke's challenge on appeal that the appropriate remedy would be to separately negotiate contracts for services, similar to the remedy in *Evanston Northwestern*.⁷⁴

The significance of this case comes from the type of merger that was challenged.⁷⁵ This was the first hospital-physician group acquisition that was challenged through full litigation.⁷⁶ More importantly, the vertical integration achieved by the acquisition and the promotion of ACA principles was not enough to overcome the effect on competition.⁷⁷ Additionally, the court in *St. Luke's* strongly encouraged looking at methods other than mergers and acquisitions to coordinate care, which has impacted the healthcare community.⁷⁸

B. Other Significant Vertical Integration Challenges

Although *St. Luke's* is the most significant case in the vertical integration context, there are other ventures that the FTC challenged. Other than *St. Luke's*, which was fully litigated, the healthcare mergers and acquisitions the FTC challenged have been abandoned or settled. However, these are notable to prove the FTC's new commitment to challenging vertical deals in healthcare and to show the types of mergers it will pursue. These challenges also highlight the need for hospitals to explore options for consolidation other than acquiring physician groups in order to avoid FTC action.

74. *Id.* at 793–93; *In re Evanston Nw. Healthcare*, Nos. 07-CV-4446, 07-CV-4523, 07-CV-5275, 08-CV-2343, 08-CV-2658, 2008 WL 2229488, at *2 (N.D. Ill. May 29, 2008).

75. Skadden Memorandum, *supra* note 51.

76. The FTC has challenged other hospital-physician group acquisitions, but the acquisitions were either abandoned after the FTC showed interest or were settled before full litigation. *See e.g.*, Press Release, Fed. Trade Comm'n, FTC Bureau of Competition Dir. Issues Statement on Providence Health & Servs. Abandonment of its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest (Apr. 8, 2011); *Renown Health*, No. C-4366, 2012 WL 6188550, at *10 (Dec. 4, 2012).

77. *St. Luke's*, 778 F.3d at 788–89, 792–93.

78. *Id.* at 791. *St. Luke's* asserted an efficiencies defense to the challenge by the FTC. *Id.* This defense claims that the efficiencies of the challenged merger will outweigh any antitrust issues. *Id.* The Supreme Court has not recognized the efficiencies defense, but some lower federal courts have allowed the argument. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001).

1. Providence Health's Failed Attempt

Providence Health planned to purchase two cardiology groups in the state of Washington.⁷⁹ There were previously four independent cardiology specialty groups in the area, but two were purchased by Providence Health's competitor hospital.⁸⁰ The FTC notified Providence Health of its concerns with the plan to acquire the cardiology groups and launched an investigation into the potential for antitrust violations under the Clayton Act.⁸¹ Before the investigation was completed, Providence Health abandoned its plans to buy the practices.⁸²

The FTC's interest in Providence Health's plan proves that it is carrying through with plans to more vigorously scrutinize all healthcare mergers after the retrospective study.⁸³ This reaffirms

79. See Richard Feinsein, Dir., Bureau of Competition, Statement on the Abandonment by Providence Health & Services of its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest in Spokane, Washington, Fed. Trade Comm'n (Apr. 8, 2011), https://www.ftc.gov/sites/default/files/documents/closing_letters/providence-health-services/spokane-cardiology-and-hearts-clinic-northwest/110321providencstatement.pdf [hereinafter Feinsein Statement].

80. William E. Berlin, *Recent Enforcement Actions: Physician Group Mergers*, HEALTH LAW ALERT NEWSLETTER (Ober Kaler), no. 8, 2012. Providence Health is one of only two hospitals in the area. *Id.*

81. *Id.* The FTC challenged this merger even though it did not meet the reporting threshold under the Hart-Scott Rodino Act, often referred to as the HSR threshold. *Id.* The Hart-Scott-Rodino Act sets forth guidelines for reporting mergers and acquisitions before they occur and requires a waiting period before finalizing the merger or acquisition for the government to review the proposed transaction. *Premerger Notification Program*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited Mar. 4, 2017).

82. Feinsein Statement, *supra* note 79.

83. *Id.* ("The Bureau of Competition recognizes that physicians across the country are exploring a variety of new business arrangements as part of an effort to achieve cost containment and quality objectives. Some of the new business arrangements include consolidating with other same-specialty or multi-specialty physician groups, entering into employment arrangements with hospitals, and forming other affiliations. Such arrangements have the potential to generate cost savings and quality benefits for patients. However, in some cases, such arrangements can create highly concentrated markets that may harm consumers through higher prices or lower quality of care. As is reflected by this investigation and its resolution, the Commission will aggressively enforce the antitrust laws to

that the FTC is no longer overlooking vertical deals and is willing to pursue hospital-physician mergers.⁸⁴

2. Renown Health's Settlement with the FTC

In Reno, Nevada, Renown Health, a hospital system, acquired a group of local cardiologists.⁸⁵ The FTC found that the acquisition resulted in Renown Health holding eighty-eight percent of the cardiologists in Reno, which would lead to higher prices.⁸⁶ The acquisition included non-compete clauses for the physicians involved.⁸⁷ This challenge ended in a costly settlement for Renown Health.⁸⁸ Under the settlement agreement, the non-compete clauses had to be waived to allow six to ten of the acquired physicians to leave Renown Health.⁸⁹

This challenge in combination with *St. Luke's* and *Providence Health*, demonstrate that the FTC will not only challenge hospital-physician deals, but it is also strengthening its position for future merger challenges. The FTC's victories should raise concerns with medical providers in areas of concentrated medical communities.⁹⁰

ensure that consolidation among health care providers will not increase health care costs in local communities across the United States.”).

84. *Id.*

85. Press Release, Fed. Trade Comm'n, FTC Order Will Restore Competition for Adult Cardiology Servs. in Reno, Nevada: Two Renown Health Acquisitions Gave it 88 percent of the Cardiology Market (Aug. 6, 2012) [hereinafter Renown Press Release].

86. *Id.*; see also, Press Release, Nev. Office of the Attorney Gen., Attorney General Masto Announces Settlement to Restore Competition for Heart Care in Reno and Sparks: Renown Health Cardiologists To Be Released From Non-Compete Terms (Aug. 6, 2012), http://members.naag.org/assets/files/Antitrust/files/antitrust.08-06-12_NV_AG_Settlement_with_Renown_Health.pdf [hereinafter Masto Press Release].

87. Renown Press Release, *supra* note 85.

88. Masto Press Release, *supra* note 86.

89. *Id.*

90. Horizontal mergers are beyond the scope of this note, although some of these mergers are being pursued under a horizontal challenge. *St. Luke's* was a hospital buying a physician practice, but after the private parties failed in their vertical merger challenge, the FTC challenged the deal as a horizontal merger. Deborah L. Feinstein, Dir., Bureau of Competition, Antitrust Enforcement in Health Care: Proscription, not Prescription, 8 (June 19, 2014),

IV. APPLYING THE LESSONS LEARNED TO MEMPHIS, TENNESSEE

Memphis hospitals can use the recent actions by the FTC as both a warning and a guideline for how to proceed with future acquisitions of physician groups. The first step to examining the potential for antitrust violations is to understand the landscape of the medical community in Memphis. The city of Memphis currently has a population of approximately 650,000, while the county in which Memphis is located, Shelby, has a population of approximately 930,000.⁹¹ A large medical community housing two large hospital systems and one smaller system serves this area.⁹² The two largest systems in the area each consist of five hospitals area-wide; the smaller system has two hospitals in the Memphis region.⁹³ The Memphis community has sixteen hospitals, including two children's hospitals, a women's hospital, a trauma center, and a veteran's hospital.⁹⁴ In addition to the state of the healthcare

https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf [hereinafter, Proscription, not Prescription]. Because St. Luke's had a physician practice already, the FTC was able view it as horizontal and argue that combining those practices would be anticompetitive. *Id.* One particular horizontal merger case has greatly influenced healthcare providers' decisions regarding mergers and acquisitions. Two Ohio hospitals attempted to merge, but the merger was blocked by the FTC. *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 561 (6th Cir. 2014). The court relied on the horizontal merger guidelines issued by the FTC to rule in favor of the FTC. *Id.* at 565–67; *see also* DEP'T. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <http://www.ftc.gov/os/2010/08/100819hmg.pdf> (outlining the enforcement policy of horizontal mergers). For a report on the case, see Robert Pear, *Regulator Orders Hospitals to Undo a Merger in Ohio*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/us/in-ohio-ftc-bans-promedica-st-lukes-merger.html>.

91. These approximations were taken from a 2014 census. *QuickFacts, Memphis, Tennessee*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/4748000,47157,47> (last visited Mar. 4, 2017); *QuickFacts, Shelby County, Tennessee*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/47157,47> (last visited Mar. 4, 2017).

92. *Area Hospitals*, MEM. MED. SOC'Y, <http://www.mdmemphis.org/index.php/info-resources/area-hospitals/> (last visited Mar. 4, 2017).

93. *Id.*

94. *Id.* Memphis is proud to be home to a leader in research and treatment for children with cancer and other life-threatening diseases, St. Jude Children's

community, the city's geographic location would prevent residents from being able to seek alternative treatment if a monopoly did arise. This landscape highlights that the Memphis healthcare community has the potential for antitrust violations to occur.

A. Potential for Antitrust Violations for Hospitals Acquiring Physicians in Memphis

Having two dominant medical systems in a small city could have a balancing effect on the competition, but it could also make it easy for one party to quickly outgrow the competition. Under the SSNIP test, the relevant geographic market is likely to be some approximation of the Memphis Metropolitan Area. Most of the large physician practices in the area serve across Shelby County and into DeSoto County, Mississippi, the largest bordering county to Shelby County.⁹⁵ With this geographic market, it is unlikely that patients would be able to leave the Memphis area to obtain services elsewhere if a hospital acquired a large physician group in the area, especially if that group also served DeSoto County.⁹⁶ Applying the

Research Hospital. Because St. Jude is such a unique medical provider, it is not included in the analysis of the medical market in Memphis provided in this Note.

95. The counties bordering Shelby County include: DeSoto County, Mississippi, approximate population 170,000; Tipton County, Tennessee, approximate population 60,000; Fayette County, Tennessee, approximate population 40,000; Marshall County, Mississippi, approximate population 36,000; and Crittenden County, Arkansas, approximate population 49,000. *QuickFacts United States*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/05/05035.html> (last visited Mar. 4, 2017) (relying on information from a 2014 census).

96. The six largest physician practices in Memphis have offices in the neighboring Desoto County. *The largest physician practices in Memphis for 2015*, MEM. BUS. J., (May 26, 2015, 11:00 PM), <http://www.bizjournals.com/memphis/gallery/196481>; see also *Contact Information*, STERN CARDIOVASCULAR CTR., <http://www.sterncardio.com/ContactUs.aspx> (last visited Mar. 4, 2017); *Find a Location*, WEST CLINIC, <http://www.westcancercenter.org/locations/> (last visited Mar. 4, 2017); *Locations*, BAPTIST MED. GROUP, <http://www.baptistdoctors.org/home/locations/search-results/?keyword=southaven&sort=13&page=1> (last visited Mar. 4, 2017); *Locations*, CAMPBELL CLINIC ORTHOPAEDICS, <http://www.campbellclinic.com/index.php/locations/> (last visited Mar. 4, 2017); *Locations*, GASTRO ONE, <https://www.gastro1.com/locations> (last visited Mar. 4, 2017); *Locations*, METHODIST PRIMARY CARE,

SSNIP test, the other surrounding counties are mostly rural and would not be able to serve a large number of the community if a monopoly on physician services increased prices and forced buyers out of the Memphis metro area.⁹⁷ Therefore, the relevant geographic market would be confined to the metro area.

Specialty practice groups are among the most frequently acquired groups in recent years.⁹⁸ For example, if one of the large hospital systems were to acquire one of the two large orthopedic groups in the city, this would be similar to the previously challenged actions involving cardiologists.⁹⁹ If a health system is allowed to purchase one group, Group A, this would leave the other health system unable to compete in that specialty area because it would be unlikely to survive a challenge in buying the other orthopedic practice, Group B.¹⁰⁰ The market would become too concentrated by the second acquisition because very few physicians in that specialty are left independent of hospital ownership. Compare this situation to Providence Health's attempt at acquiring the two cardiology groups in Washington.¹⁰¹ Its acquisition was challenged in part because its main competitor hospital had previously

<http://www.methodisthealth.org/locations/#Primary-Care> (last visited Mar. 4, 2017).

97. See U.S. DEP'T OF AGRIC., *Tennessee Three rural definitions based on Census Places*, https://www.ers.usda.gov/webdocs/DataFiles/Rural_Definitions__18009/25597_TN.pdf?v=39329 (last visited Mar. 4, 2017).

98. See DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 50 at 8. (discussing how to define a geographic market based on the locations of customers).

99. See *supra* Section III.B.1. One of the large orthopedic groups in the Memphis area has approximately thirty-five physicians and the other has approximately fifty. See MSK GROUP, P.C., <http://www.mskgroup.org> (last visited Mar. 4, 2017); *Physicians*, CAMPBELL CLINIC ORTHOPAEDICS, <http://www.campbellclinic.com/index.php/physicians/list-alphabetically/> (last visited Mar. 4, 2017). There are approximately 120 orthopedic surgeons in the Memphis area. See *Orthopedic Surgeons Near Memphis, Tennessee*, U.S. NEWS & WORLD REPORT, <http://health.usnews.com/doctors/orthopedic-surgeons/memphis-tn> (last visited Mar. 4, 2017).

100. These two groups together comprise the majority of the orthopedic surgeons in the area, with only much smaller groups remaining. The larger of the two groups is the third largest physician group in the city of any specialty type. *The largest physician practices in Memphis for 2015*, *supra* note 96.

101. See *supra* Section III.B.1; *Feinstein Statement*, *supra* note 79.

purchased the other two dominant cardiology groups in the area.¹⁰² With a similar acquisition already challenged by the FTC in another city, smaller practices may be a better target than large, dominant specialty groups for growing a hospital system in Memphis because the increase in market share would be less significant.¹⁰³

Other than specialty groups like cardiologists and orthopedic surgeons, the largest concern in an area like Memphis is hospitals acquiring primary care physician practices. Not only have the larger hospital systems grown vastly over the last five years via acquisitions, but even the smaller systems have adopted the practice of buying primary care facilities.¹⁰⁴ The two largest physician groups in Memphis are hospital-owned primary care physicians.¹⁰⁵ It is easy to see the concern over concentration here because a price increase is likely to affect a large population of patients in Memphis. If the market becomes too concentrated in these two hospital systems, they should be wary of possible federal intervention.¹⁰⁶ This becomes a more prevalent concern if one of the systems acquires a majority of the primary care physician market. Again, hospital-physician practice mergers are now being challenged heavily by the FTC.¹⁰⁷

It is easy to conclude that Memphis's hospital systems will not slow their growth in the near future, especially considering recent projections that mergers in healthcare will continue across the

102. Berlin, *supra* note 80.

103. See *Feinstein Statement*, *supra* note 79.

104. One of the hospital systems has eighteen primary care offices and the other has sixteen primary care offices in Shelby County, Tennessee. See *Locations*, BAPTIST MED. GROUP, <http://www.baptistdoctors.org/home/locations/search-results/?keyword=southaven&sort=13&page=1> (last visited Mar. 4, 2017); *Our Facilities*, METHODIST PRIMARY CARE, <http://www.methodisthealth.org/locations/primary-care-physicians/index.dot> (last visited Mar. 4, 2017).

105. See *The largest physician practices in Memphis for 2015*, *supra* note 96.

106. See Brill Keynote, *supra* note 10 at 4–6 (citing *ProMedica Health Sys. V. FTC*, 749 F.3d 559, 570 (6th Cir. 2014) (discussing court approval on the “presumption of illegality to a merger in which there was a strong correlation between market share and price, and where the merger would create further concentration in an already highly concentrated market”).

107. See *Proscription, not Prescription*, *supra* note 90.

country.¹⁰⁸ With this in mind, the systems should consider diversifying their growth over different specialties and practices.

B. Alternatives to Acquiring Physician Groups

Memphis area hospitals should consider alternatives to acquisitions to avoid antitrust actions by the government.¹⁰⁹ The court in *St. Luke's* noted that, although the intentions to coordinate care were positive, there were other avenues to achieve this coordination without acquiring physicians.¹¹⁰ Affiliations or partnerships both meet the goals of the ACA and avoid antitrust actions that arise through losing independence.¹¹¹

Affiliations are becoming one of the most utilized alternatives to mergers and acquisitions.¹¹² In an affiliation, each provider remains a separate entity, but each can utilize the other for information and ideas.¹¹³ This trend has already caught on in Memphis; one of the largest providers of healthcare in the area, recently affiliated with the Mayo Clinic.¹¹⁴ Through this affiliation,

108. See Reed Abelson, *Health Care Companies in Merger Frenzy*, N.Y. TIMES (Oct. 29, 2015), <http://www.nytimes.com/2015/10/30/business/dealbook/health-care-companies-in-merger-frenzy.html>.

109. See Lewis et al., *supra* note 63.

110. *Saint Alphonsus Med. Ctr.–Nampa, Inc. v. St. Luke's Health. Sys.*, 778 F.3d 775, 792 (9th Cir. 2015) (“That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations.”). The Ninth Circuit acknowledged *St. Luke's* efforts to coordinate care but ultimately decided that merger is not a necessary means to the goal of coordination. *Id.*

111. See Molly Gamble, *Not a Merger, Not an Acquisition: When and Why Strategic Partnerships Make Sense*, BECKER'S HOSP. REV. (Nov. 21, 2011), <http://www.beckershospitalreview.com/hospital-transactions-and-valuation/not-a-merger-not-an-acquisition-when-and-why-strategic-partnerships-make-sense.html> [hereinafter Gamble]. Gamble argues that partnerships can share resources while still remaining independent. *Id.*

112. John N. Fink, *Affiliations: Alternatives to Mergers and Acquisitions*, HEALTHCARE FIN. MGMT. ASS'N (Nov. 12, 2012), <http://www.ecgmc.com/thought-leadership/blog/affiliations-alternatives-to-mergers-and-acquisitions> (“Affiliations have become an attractive alternative to overcome the challenges facing many healthcare organizations.”).

113. See Gamble, *supra* note 111.

114. Michael Sheffield, *Mayo Clinic Coming to Memphis with Local Health Care Partnership*, MEMPHIS BUS. J. (Jul 23, 2015, 8:45 AM),

Memphis providers have access to the specialized knowledge and resources of the large Mayo Clinic network.¹¹⁵ This type of affiliation achieves coordination of care without the legal consequences of a merger. Additionally, Mayo Clinic does not have any facilities in the Memphis area, which eliminates the danger for concentrating the market.¹¹⁶ Also, through affiliations or partnerships, physicians can still practice at other facilities while partnering with hospitals for coordination.¹¹⁷ In fact, one of the larger medical systems in Memphis has partnered with the largest cardiology group in the area.¹¹⁸

By choosing to align with providers in ways other than mergers and acquisitions, hospital systems are able to avoid actions by the FTC and sidestep the creation of negative effects on the medical market. Affiliations and partnerships still produce many of the same outcomes that are sought through mergers, and courts have been encouraging this type of coordination of care in lieu of mergers or acquisitions.¹¹⁹

V. CONCLUSION

In the wake of the FTC's revived aggression toward healthcare mergers and acquisitions, hospital systems across the nation should proceed with caution to avoid antitrust challenges. The FTC proved through recent cases and evidence collected from

http://www.bizjournals.com/memphis/blog/morning_call/2015/07/methodist-announces-affiliation-with-the-mayo.html.

115. *Id.*

116. *See Medical Departments & Centers*, MAYO CLINIC, <http://www.mayoclinic.org/departments-centers/index> (last visited Mar. 4, 2017).

117. *See Baptist to Partner with Stern Cardiovascular*, MEMPHIS BUS. J. (Jan. 7, 2011, 10:50 AM), <http://www.bizjournals.com/memphis/news/2011/01/07/baptist-to-partner-with-stern.html> (discussing the partnership and commenting that the physicians will continue to provide treatment at other hospitals); *Baptist Memorial Healthcare Organization Overview*, BAPTIST MEMORIAL HEALTHCARE, <http://www.baptistonline.org/about/organization/> (last visited Mar. 4, 2017).

118. *Baptist to Partner with Stern Cardiovascular*, *supra* note 117. This group has since expanded through a merger with another Memphis area cardiology group. *See Stern Cardiovascular Foundation is the Largest Cardiovascular Group in Memphis*, THE STERN CARDIOVASCULAR CTR., <http://www.sterncardio.com> (last visited Apr. 6, 2016).

119. *See Gamble*, *supra* note 111.

past anticompetitive mergers that it is committed to challenging healthcare mergers and acquisitions. The decision in *St. Luke's* emphasizes that the FTC is beginning to focus more on vertical acquisitions instead of its traditional focus on horizontal mergers in healthcare. In Memphis, there has been a significant rise in vertical integration through hospitals acquiring physician groups. By applying the lessons learned from *St. Luke's*, *Providence Health*, and *Renown Health* to the Memphis market, hospitals can avoid becoming too concentrated, especially in the primary care physician and specialty group markets. Because this trend does not seem to be slowing within the area, Memphis hospital systems should continue to seek diversified practices or choose other methods of coordination. Affiliations and partnerships are two ways of coordinating care that have recently proven popular and should be considered by Memphis hospitals seeking to align with physicians. By utilizing these alternate avenues, Memphis hospitals can avoid antitrust actions for monopolizing the market and still achieve integration and coordination of care that is promoted by the ACA.