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Can Cleveland Clinic Health System Be Trusted: Whether a Proposed Merger or Acquisition by Cleveland Clinic Health System Will Substantially Impair the Competitive Health Care Market in Northeast Ohio Resulting in a Violation of Federal Antitrust Statutes

Matthew T. Polito

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CAN CLEVELAND CLINIC HEALTH SYSTEM BE TRUSTED:
 WHETHER A PROPOSED MERGER OR ACQUISITION BY
 CLEVELAND CLINIC HEALTH SYSTEM WILL
 SUBSTANTIALLY IMPAIR THE COMPETITIVE HEALTH CARE
 MARKET IN NORTHEAST OHIO RESULTING IN A VIOLATION
 OF FEDERAL ANTITRUST STATUTES

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“It cannot be helped, it is as it should be, that the law is behind the times.”¹

I. INTRODUCTION

Changes in the health care industry and increasing costs of health care create incentives for hospitals to consider hospital mergers. From 1981 to 1991, as many as 195 hospitals underwent mergers.² The next decade demonstrated a drastic upsurge of hospital mergers, from 18 in 1993 to 735 in 1995.³ This rise in mergers may stem from economic reasons, but also may be attributable to the federal government’s difficulties in enjoining such mergers under the antitrust laws. This article will demonstrate that Cleveland Clinic Health System’s (CCHS) recent mergers and acquisitions have increased market concentration, giving CCHS undue market control, and triggering serious antitrust concerns justifying further investigation by the Federal Trade Commission (FTC).

A network of not-for-profit hospitals, CCHS provides acute-care health care services to Northeast Ohio. CCHS claims that its mergers and hospital combinations create a service for the people of Northeast Ohio with which no other health system in the area can compete.⁴ CCHS consists of Euclid Hospital, Fairview Hospital, Hillcrest Hospital, Huron Hospital, Lakewood Hospital, Lutheran Hospital, Marymount Hospital, South Pointe Hospital, Cleveland Clinic Children’s Hospital Rehabilitation, and The Cleveland Clinic.⁵ Also affiliated with CCHS are Ashtabula County Medical Center and Grace Hospital.⁶ These hospital affiliates take part in numerous programs provided by CCHS, but have not yet been legally merged into CCHS.⁷

This article analyzes the implications of the Clayton Antitrust Act⁸ (Clayton Act) and the Sherman Antitrust Act⁹ (Sherman Act) as they pertain to the CCHS. Part One provides background analysis of these two statutes, and the application of those statutes to mergers in the health care industry. Part Two discusses the elements needed to prove the government’s prima facie case. This consists of a discussion of a relevant market, which includes the product and geographic markets. This section also contains a description and analysis of market concentration, measured by the Herfindahl-Hirschman Index (HHI). Part Three provides further background

¹Justice Oliver Wendell Holmes, speech at Harvard Law School Association of New York, New York City, February 15, 1913. Speeches by Oliver Wendell Holmes 101 (1934).

²Donna A. Alexander, *UPMC Mergers Under Antitrust Law: An Analysis of the Application of the Federal Antitrust Laws to Non-Profit Hospital Mergers*, 38 DUQ. L. REV. 77 (1999).

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷Alexander, *supra* note 2, at 77.

⁸Clayton Act §§ 1-14, 15 U.S.C. §§ 12-25 (2002).

⁹Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (2002).

information on the CCHS hospital affiliates, and discusses CCHS' recent acquisition activities. Part Four analyzes whether these recent activities amount to a violation of antitrust laws, warranting further investigation by the FTC. This section also provides a description and analysis of two possible defenses that CCHS may raise.

II. OVERVIEW OF THE RELEVANT ANTITRUST LAWS

Antitrust laws, in general, help to maintain a competitive market, and in turn protect the consumer from unwarranted price increases.¹⁰ The Federal Trade Commission (FTC) and the Department of Justice (DOJ) are the federal agencies charged with enforcing the Clayton Act¹¹ and the Sherman Act.¹² These two statutes preserve competition and protect consumers from unfair price increases.¹³ Similarly, the antitrust laws afford protection to existing competitors as well as potential competitors attempting to enter the market.¹⁴

¹⁰Alexander, *supra* note 2, at 79.

¹¹Clayton Act §§ 1-14, 15 U.S.C. §§ 12-25 (2001). Section 18 of the Clayton Act states in relevant part: "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

¹²Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7. The Sherman Act states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court..."

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." *Id.*

¹³Kenneth E. Yeadon, *Allowing Large Hospitals to Merge: United States v. Long Island Jewish Medical Center*, 3 DEPAUL J. HEALTH CARE L. 79, 79-80 (1999).

¹⁴First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F. Supp. 925, 930 (E.D. Pa. 1975).

A. The Sherman Act

In 1890, Congress passed the Sherman Act, the first federal antitrust statute enacted in the United States.¹⁵ Its purpose is to prevent competitors from creating monopolies through mergers, thus driving up prices.¹⁶ The framers of the Sherman Act did not intend to restrain competent business decisions of any given company or individual, absent the intent to monopolize.¹⁷ The Sherman Act allows for a great deal of freedom to contract or otherwise, absent the intent to monopolize, but collaborative action through combinations and mergers raises a different problem. The Act prohibits such action when it tends to lessen or destroy competition in any given market, to which the consumer has sought protection.¹⁸ This gives companies the ability to exercise business judgment without being concerned about potential violations of the antitrust laws. As long as these decisions are not for the purpose of monopolizing then the company in question is exempt from prosecution under the Sherman Act.¹⁹ In 1890, Congress intended to use the Commerce Clause of the United States Constitution to its full potential to have it reach the substantive prohibitions of the Sherman Act, thus creating a competitive business market under the fullest use of Congressional power permitted by the Constitution to regulate interstate and foreign commerce.²⁰

The Sherman Act embraces a distinct economic theory, i.e., that uninhibited competition better regulates prices and production than even the most enlightened merger.²¹ Nevertheless, the Sherman Act does not apply to monopolies in and of themselves.²² The Sherman Act's purpose is to restrict and restrain activities and combinations that inhibit or affect interstate commerce.²³

¹⁵Alexander, *supra* note 2, at 79.

¹⁶*Id.*

¹⁷Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

"[T]rade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, ... the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce." *Id.* at 586.

¹⁸*Id.* at 578.

¹⁹*See Id.*

²⁰Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973) (citing U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-59; 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)).

²¹United States v. Nat'l Lead Co., 63 F. Supp. 513 (S.D.N.Y.1945).

²²Bigelow v. Calumet & Hecla Mining Co., 167 F. 721 (6th Cir. 1909).

²³*Id.*

The Sherman Act will not be used to prevent normal growth of any particular business; the size of a company itself is not a violation of the Act.²⁴ As long as a company gains expanse through lawful means, and violates no other law to perpetuate company growth, the company will not trigger the Sherman Act.²⁵ The Act however does not necessarily look to the form or the means of the merger, but looks at the intended results to be achieved by such merger.²⁶ It is irrelevant whether the means used to achieve the illegal end are themselves legal or illegal.²⁷ If the company's means perpetuate a conspiracy to eliminate competition, then such activity is within the scope of what the Act prohibits.²⁸

Sherman Act decisions are highly fact specific.²⁹ Courts closely analyze the facts of each case because the Sherman Act does not provide any definitions for its terms.³⁰ Despite the absence of these definitions, congressional intent analysis indicates that the terms "contract," "combination," or "conspiracy in restraint of trade or commerce," may be interpreted and given the same meaning attributed to these words through common law.³¹ In applying this rule to potential antitrust cases, district courts and circuit courts often hold that each case arising under the Act must be resolved based on the facts presented in the record of each case.³² Therefore, each new case that arises must be factually distinguished from any prior case being examined as precedent.³³ Consequently, cases arising under the Sherman Act will be relatively difficult to prove, as precedent will be limited. With each case primarily fact driven, it will be difficult, although not impossible, to locate cases on point.

Although the Sherman Act seeks to protect a competitive market, its role is not a cure-all for all wrongs committed in the marketplace.³⁴ A literal approach to section one of the Sherman Act would prohibit every contact, combination, or conspiracy that restrained trade.³⁵ If courts used this standard, section one would prohibit nearly

²⁴United States v. N.Y. Great Atl. & Pac. Tea Co., 67 F. Supp. 626, 642 (E.D. Ill. 1946) (citations omitted).

²⁵*Id.*

²⁶First Delaware Valley Citizens Television, Inc. v. CBS, Inc. and WHP, Inc., 398 F. Supp. 925, 928 (E.D. Pa. 1975) (citing American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)).

²⁷*Id.*

²⁸*Id.*

²⁹United States v. Parker-Rust-Proof Co., 61 F. Supp. 805 (E.D. Mich. 1945).

³⁰Maple Flooring Mfrs. Ass'n, 268 U.S. 563 (1925). *See also* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Sugar Institute, Inc., v. U.S., 297 U.S. 553 (1936).

³¹Standard Oil Co. v. United States, 221 U.S. 1 (1911).

³²*Maple Flooring Mfrs. Ass'n*, 268 U.S. at 579.

³³*Id.*

³⁴Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 448 (3rd Cir. 1978).

³⁵*Id.* at 446 (citing Northern Pac. R.R. v. United States, 356 US 1, 5 (1958)).

every contract or combination concerning trade, because in some sense every agreement or merger concerning trade will in some way restrain trade.³⁶ Therefore, courts interpret this section of the Sherman Act to prohibit only those contracts or combinations that *unreasonably* restrain competition.³⁷

1. Discussion of the Rule of Reason

The United States Supreme Court held in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,³⁸ that the most widely used standard in the application of the Sherman Act is the rule of reason.³⁹ Under the requirements of the rule of reason the finder of fact must consider all of the circumstances surrounding an activity to determine whether such activity should be prohibited as an unreasonable restraint on trade.⁴⁰ Certain situations that arise however, will be considered violative of the Sherman Act absent any contemplation of the situation's reasonableness.⁴¹ Using the rule of reason in every case would be time consuming and expensive, thus expenses have been saved and time spent on litigation reduced by the recognition of per se rules.⁴²

Before 1975, courts generally held that members of the medical profession and other "learned professions" were exempt from antitrust laws.⁴³ The exemption stemmed from the Supreme Court view that involvement in "learned professions" was not interstate in nature, and therefore did not fall within the scope of the Sherman Act.⁴⁴ The Supreme Court restricted this exemption in the case of *American Medical Association v. United States*.⁴⁵ In that case, the Court considered whether the medical profession participated in "trade" or "commerce" within the scope of the Sherman Act.⁴⁶ But, the Court refused to answer the question, stating "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was . . . obstruction and restraint of the business of Group Health."⁴⁷ The court will no longer concentrate on the status of the person participating in the prohibited conduct, but will focus instead on the status of the target of such restraint. By recognizing this shift in focus, the Court established the possibility that federal antitrust laws could apply to the learned

³⁶*Id.*

³⁷*Id.*

³⁸*Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982).

⁴³MATTHEW BENDER, ANTITRUST LAWS AND TRADE REGULATION § 70.01 (2d ed. 2001).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*American Medical Association v. United States*, 317 U.S. 519, 528 (1943).

⁴⁷*Id.*

professions.⁴⁸ It was not until the 1975 landmark case *Goldfarb v. Virginia State Bar*⁴⁹ that the Court eliminated the “learned professions” exemption to antitrust laws.⁵⁰ Today, it is well understood that the activities of “learned professions” represent an important part of interstate commerce, and that anticompetitive activities by these professionals may constitute unreasonable restraint on commerce.⁵¹

2. Application of the Per Se Rule

The Sherman Act’s per se rule applies to *many* industries. This design creates a rebuttable presumption that the health care industry will also be within the scope of the Sherman Act. In the past, the Supreme Court demonstrated some reluctance in applying the per se rule to activities in the health care industry. The Court though has also made it clear that this industry is not exempt from the application of this rule.⁵² In *Arizona v. Maricopa County Medical Co.*,⁵³ the Supreme Court applied the per se rule, disallowing price-fixing by physicians, stating “[i]n unequivocal terms..., [whatever] may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.”⁵⁴ Before the case reached the Supreme Court, the Ninth Circuit Court of Appeals refused to apply the per se rule reasoning that the health care market was far removed from the competitive model.⁵⁵ Lower federal courts remain reluctant to apply the per se rule to the health care industry.⁵⁶

B. The Clayton Act

Due to the rigid and narrow interpretation of the Sherman Act by the Supreme Court that made it difficult for the government to prove an antitrust violation, Congress passed the Clayton Act in 1914.⁵⁷ Following its passage, Congress made numerous amendments to the Clayton Act, the most drastic being the revision of

⁴⁸BENDER, *supra* note 43.

⁴⁹421 U.S. 773 (1975).

⁵⁰*Id.*

⁵¹*Id.* at 788.

⁵²*Id.*

⁵³457 U.S. 332 at 349 (citations omitted).

⁵⁴*Id.*

⁵⁵*Id.* at 349-350.

⁵⁶*See generally* *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 518 F. Supp. 1100, 1107 (D. Conn. 1981), *aff’d*, 675 F.2d 502 (2d Cir. 1982); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991); *Kieper v. Beller*, 944 F.2d 1213 (5th Cir. 1991); *U.S. v. Alston*, 974 F.2d 1206, 1214 (9th Cir. 1992); *Betkerur v. Aultman Hosp. Ass’n*, 78 F.3d 1079, 1093 (6th Cir. 1996); *Retina Associates, P.A. v. Southern Baptist Hosp.*, 105 F.3d 1376, 1381-82, *reh’g denied*, 113 F.3d 1253 (11th Cir. 1997); *Pontius v. Children’s Hosp.*, 552 F. Supp. 1352, 1369 (W.D. Pa. 1982).

⁵⁷Alexander, *supra* note 2, at 79.

December 29, 1950, which reworded the first five paragraphs of the original Clayton Act.⁵⁸ Congress made subsequent amendments in 1980, 1984, 1995, and 1996, but none of these amendments were as extensive as the changes made in 1950.⁵⁹

⁵⁸15 U.S.C. § 18 (2001). The 1950 amendments of December 29, 1950, substituted the first five paragraphs for ones that read:

“That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.”

“No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.”

“This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.”

“Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.”

“Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: provided, that nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.” *Id.*

⁵⁹*Id.* See *infra* notes 103-05 and accompanying text.

1. Discussion of Seminal Antitrust Case: *Brown Shoe Co. v. United States*

The seminal *Brown Shoe Co. v. United States*⁶⁰ decision interprets the 1950 changes to the Clayton Act. The original 1914 text of the Clayton Act disallowed the acquisition of stock of one corporation by another corporation, when the acquisition would create a substantial lessening of competition between the two companies or would tend to create a monopoly in any line of commerce.⁶¹ The original text of the Clayton Act did not prohibit the acquisition of the assets of one corporation by another corporation.⁶² Similarly, the original Clayton Act did not prohibit the acquisition of stock in one company by any other company other than a direct competitor.⁶³

Early interpreters of the Clayton Act believed that the drafters of the original text of the Act overlooked the fact that an asset acquisition may result in just as substantial a lessening of competition as a stock acquisition. A close inspection of the legislative history establishes that this belief lacks merit.⁶⁴ On the contrary, during the debates over the Clayton Act, legislators discussed asset acquisitions, but deemed them unimportant, as the purpose was to prevent the development of holding companies and acquisitions of competitors through the purchases of their stock.⁶⁵

After the Clayton Act passage in 1914, it was not long before the FTC found problems with the language and limits of the Act, most specifically in section seven.⁶⁶ Initially the FTC wanted to address two issues: first, plugging the loophole that allowed for an exemption of asset acquisitions under the Act; second, requiring companies to give notification of proposed mergers to the FTC before consummation.⁶⁷ Congress held numerous hearings on both of these proposals. Neither proposal ever reached the floor of Congress however, until the adoption of the amendments in 1950.⁶⁸ The legislative history indicates that the original scope of the proposed amendment of 1950 to section seven was only to reach asset and stock acquisitions and their potential threat to competition, but once the proposal reached the floor of Congress, a number of hearings conducted by both the Eightieth and Eighty-first Congresses provided a broader scope for the soon-to-be amended section seven.⁶⁹

Prior to the 1950 amendments of the Clayton Act, the FTC and Congress had great difficulty interpreting the language of section seven of the Act. Between the

⁶⁰370 U.S. 294 (1962).

⁶¹*Id.* at 313.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Brown Shoe Co.*, 370 U.S. at 313-14.

⁶⁶*Id.* at 314; *see also* 15 U.S.C. § 18 (2001).

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Brown Shoe Co.*, 370 U.S. at 314-15.

years of 1943 and 1949, legislators introduced as many as sixteen bills to amend section seven of the Clayton Act to Congress for their consideration. In three separate sessions, and in full public hearings, Congress discussed issues regarding these proposed amendments.⁷⁰ Even with a close inspection of the legislative history concerning the 1950 amendments, the congressional standards intended for the FTC and the courts to use to determine whether a proposed merger was legal remain elusive.⁷¹ Although section seven of the Clayton Act, as amended in 1950, does not explicitly state the standards needed for a proper and fair adjudication of the legality of a proposed merger, the House and Senate reports provided sufficient information. The transcripts from the floor debates further provided proper guidance for the FTC, as well as for the courts when reviewing proposed mergers and acquisitions.⁷² The 1950 amendments, combined with the interpretation of the House and Senate Reports, substantially alleviated the problems from the original 1914 Clayton Act and the difficulty with enforcing the Sherman Act.

In *Brown Shoe Co.*, one of the first United States Supreme Court cases subsequent to the 1950 amendments, the government based its complaint on accusations that the defendant had been in violation of section seven of the Clayton Act.⁷³ Initially, the FTC filed a claim asserting that the possible merger between the defendant shoe companies, by way of a stock exchange, violated section seven of the Clayton Act.⁷⁴ The complaint requested injunctive relief to prevent achievement of the merger.⁷⁵ At trial, the United States District Court for the Eastern District of Missouri held that the proposed merger of the two companies violated section seven of the Clayton Act as amended in 1950, and granted the FTC's injunction denying the merger.⁷⁶ The United States Supreme Court affirmed the district court's decision, holding that the merger would be likely to considerably reduce competition in the retail sale of men's, women's, and children's shoes, specifically in a large majority of cities and their surrounding areas where both defendants did business.⁷⁷ The defendant's failure to prove that the company proposed the merger to prevent the loss of resources due to a failing firm, or that the proposed merger would make it possible for smaller competitors to enter the market, triggered the court's decision.⁷⁸

⁷⁰*Id.*

⁷¹*Id.* at 315.

⁷²*Id.*

⁷³See *Brown Shoe Co.*, 370 U.S. at 311-12

⁷⁴See generally *Brown Shoe Co.*, 370 U.S. 294 (1962).

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

2. Eight Factors Established by *Brown Shoe Co. v. United States*

The purpose of the 1950 amendments was to make all types of mergers (vertical and horizontal), acquisitions, and conglomerations subject to the Clayton Act.⁷⁹ In *Brown Shoe*, the Court established an eight-factor test for determining the validity of a proposed merger under the Clayton Act.⁸⁰ First, Congress made both asset sales and stock acquisitions subject to the Act.⁸¹ Second, Congress deleted the language “acquiring-acquired,” with the purpose of making it easier to have section seven apply not only to horizontal mergers but also to vertical and conglomerate mergers. If not prohibited, these mergers could result in the lessening of competition in a line of commerce in a section of the country.⁸² Third, Congress sought to afford power to the FTC and courts to prevent such mergers and acquisitions resulting in undue concentration from occurring before potential harm could reach the consumer.⁸³

Fourth, Congress intended to apply the Sherman Act standards to section seven of the Clayton Act as well.⁸⁴ This move helped to establish the understanding that the Clayton Act and the Sherman Act compliment each other and should be read together. Although the standards used to prove a case are now the same, it will be easier for the government to make a case under the Clayton Act, as the language of the statute can be and has been interpreted more broadly.

Fifth, Congress was concerned with competition, not competitors, therefore it was not Congress’ intent to prevent mergers of two small competitors or a viable company merging with a failing company, so that those competitors may still compete in the market. Congress instead intended to prevent the type of combinations that would substantially lessen competition in a section of the country.⁸⁵ A blanket look at the legislative history illustrates that the concern Congress has lies with the protection of competition, not the individual competitors, and it shows that Congress has the aspirations to only restrain mergers and acquisitions to the extent that these activities will result in the tendency to lessen competition in any given market.⁸⁶

Sixth, Congress did not adopt or reject any test for the measurement of either of the relevant markets (product or geographic).⁸⁷ Congress also did not define the word “substantially” in any way, which would have given the courts a means of

⁷⁹United States v. E. I. Du Pont de Nemours and Co., 353 U.S. 586 (1957). *See also* *Brown Shoe Co.*, 370 U.S. at 294.

⁸⁰*Brown Shoe Co.*, 370 U.S. at 316.

⁸¹*Id.*

⁸²*Id.* at 317.

⁸³*Id.* 317-18.

⁸⁴*Id.* at 318.

⁸⁵*Brown Shoe Co.*, 370 U.S. at 319-20.

⁸⁶*Id.* at 320 (emphasis original).

⁸⁷*Id.*

measuring the competitive or anticompetitive effects of a proposed merger.⁸⁸ It appears that this was to be left up to the interpretation of the court.

Seventh, although neither the FTC nor the DOJ have established any tests, quantitative, qualitative, or otherwise, to define whether any activity “substantially” lessens competition or tends toward a monopoly, Congress has indicated that a merger or acquisition has to be functionally viewed in the framework of its market.⁸⁹ This means that the proposed merger or acquisition will be viewed in light of whether it will take place in a concentrated market, where it had recent activity by a few controlling companies attempting to dominate the market, or, where there is easy accessibility to the market by other competitors and suppliers, or finally, where the company created barriers to prevent the entrance of other competitors.⁹⁰ All of these factors will be taken into account when determining whether a merger or acquisition results in “substantially” lessening competition in an industry.⁹¹

Eighth and finally, Congress couched section seven’s words “may be substantially to lesson competition” in terms of probabilities, not certainties.⁹² Although Congress did not provide an explicit definition of the term “substantially,” it did provide direction for the FTC and the courts in gauging the anticompetitive possibilities of a potential merger. Thus, one purpose of the Clayton Act was to address potential harm to competition in the market.⁹³

1980 brought an additional and important amendment to the text of the Clayton Act.⁹⁴ In the original 1914 version of the Clayton Act, Congress used the word “corporation” throughout the Act when describing the potential antitrust defendant.⁹⁵ The use of this word continued though the 1950 amendments of the Act.⁹⁶ In 1980, Congress changed the word “corporation(s)” to “person(s),” wherever it appeared in the Clayton Act, prohibiting anticompetitive acquisitions by a larger group of entities, because the word “person(s)” may be more broadly defined than the word “corporation(s).”⁹⁷ With the 1980 amendment, Congress meant to eliminate the loophole in section seven of the Clayton Act.⁹⁸

⁸⁸*Id.* at 321.

⁸⁹*Id.* at 321-22.

⁹⁰*Brown Shoe Co.*, 370 U.S. at 321-22.

⁹¹*Id.*

⁹²*Id.* at 323 (emphasis original).

⁹³*Id.*

⁹⁴15 U.S.C. § 18 Ann.

⁹⁵*See* 15 U.S.C. § 18 Ann.

⁹⁶*Id.*

⁹⁷*In re Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *38 (F.T.C. Aug. 2, 1991) (citing 15 U.S.C. § 18).

⁹⁸*Id.* at *39 (citing 15 U.S.C. § 18a) (citations omitted).

Two particular features make the 1980 amendment significant.⁹⁹ First, as with the amendments of 1950, this amendment expanded the reach of section seven, and it demonstrates that Congress intends to eventually be able to reach all possible activity that may have an anticompetitive result. Thus, Congress is allowing only “pure” asset acquisitions in a select few controlled industries.¹⁰⁰ Section eleven of the Clayton Act, therefore, which discusses jurisdictional issues, should not be interpreted narrowly in order to exclude certain entities from the jurisdictional reach of the prosecuting bodies.¹⁰¹ Also, with the insertion of the word “person(s)” instead of “corporation(s)” in section seven and section eleven of the Clayton Act, courts may use section eleven of the Clayton Act, as opposed to the FTC Act, to determine whether the FTC has jurisdiction over a particular issue.¹⁰² The FTC benefits from this change, as section eleven may be, and has been interpreted more broadly than the FTC Act.¹⁰³

Second, by changing the language of the statute to read “person” instead of “corporation,” the amendment made section seven of the Clayton Act more inclusive. It is now possible for section seven of the act to reach all entities defined in section one of the Act.¹⁰⁴ This amendment also eliminates any prior confusion between terms in this Act with the terms used in the FTC Act.¹⁰⁵

The legislative history of the Clayton Act establishes that the tests for determining the legality of a merger or acquisition are less stringent than those used

⁹⁹*Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *39.

¹⁰⁰*Id.* (citations omitted).

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Adventist Health Sys.*, No. 9234, at *39. *See also* 15 U.S.C. § 21 Ann.

(a) Commission, Board, or Secretary authorized to enforce compliance. Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act [15 USCS §§ 13, 14, 18, 19] by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code [49 USCS §§ 10101 et seq.]; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 USCS Appx §§ 1301 et seq.]; in the Federal Reserve Board [Board of Governors of the Federal Reserve System] where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders. Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act [15 USCS §§ 13, 14, 18, 19]... *Id.*

¹⁰⁵*Id.*

under the Sherman Act.¹⁰⁶ Similarly, the Clayton Act only requires a showing of a *potential* anticompetitive effect while the Sherman Act requires a showing of *actual* restraint.¹⁰⁷ Because the test used to decide a case under the Clayton Act differs slightly from that used for a claim arising under the Sherman Act, court decisions under the Sherman Act are not binding precedent under the Clayton Act, and vice versa.¹⁰⁸

3. Application of Section 7 of the Clayton Act to Not-For-Profit Hospitals

Some scholars argue that section seven of the Clayton Act does not apply to not-for-profit hospitals, because under section eleven of the Clayton Act, the FTC lacks jurisdiction to hear such cases.¹⁰⁹ Conversely, courts determined that section seven of the Clayton Act does apply to not-for-profit hospitals. Courts have held that section eleven of the Clayton Act¹¹⁰ gives jurisdiction to the FTC to enforce the provisions set forth in section seven of the Clayton Act over mergers and acquisitions by nonprofit entities.¹¹¹ Three other decisions rendered by federal courts and decided after *Philadelphia National Bank*, scrutinize the issue of whether asset acquisitions made by not-for-profit hospitals will “be subjected to a government antitrust prosecution under the Clayton Act.”¹¹²

¹⁰⁶*Treadway Co. v. Brunswick Corp.*, 389 F. Supp. 996 (D.N.J. 1974).

¹⁰⁷*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

¹⁰⁸*United States v. Smith Pie Co.*, 440 F.Supp. 220 (E.D. Pa. 1976).

¹⁰⁹*See Philadelphia National Bank*, 374 U.S. at 321; *Adventist Health Sys.* No. 9234, 1991 F.T.C. LEXIS 354, *1.

¹¹⁰15 U.S.C. § 21 (2001). Section 11 of the Clayton Act states in relevant part; “(a) Commission, Board, or Secretary authorized to enforce compliance. Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act [15 U.S.C.S. § 13, 14, 18, 19] by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code [49 U.S.C.S. § 10101 et seq.]; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 U.S.C.S. Appx § 1301 et seq.]; in the Federal Reserve Board [Board of Governors of the Federal Reserve System] where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:” *Id.*

¹¹¹*Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *3.

¹¹²*Id.* at *49 (discussing, *F.T.C. v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 295 (1990); *United States v. Carilion Health Sys.*, No. 89-2625, 1990 U.S. App. LEXIS 2657).

In the first of the three cases, *FTC v. University Health, Inc.*,¹¹³ the plaintiff, FTC, sought a preliminary injunction from the court to prevent University Health, Inc., a nonprofit corporation owning other nonprofit hospitals in the Augusta Georgia area, from acquiring St. Joseph Hospital, also a nonprofit hospital.¹¹⁴ Even though the court denied FTC's request for a preliminary injunction, the court also denied a motion to dismiss by the defendants, based on the nonprofit status of the hospitals.¹¹⁵ The FTC appealed the district court's decision. Although there was no discussion of the FTC's jurisdiction over this matter, it would have been impossible for the court to make a decision on the merits of such a case without first determining that the FTC had jurisdiction under section seven of the Clayton Act, concerning the asset acquisitions by nonprofit hospitals.¹¹⁶

In the second case, *United States v. Rockford Memorial Corp.*,¹¹⁷ the DOJ attempted to prevent the merger of two nonprofit hospitals.¹¹⁸ The court held that the merger was in violation of section seven of the Clayton Act, and the defendants appealed, claiming that a merger of two nonprofit hospitals was outside the scope of section seven of the Clayton Act.¹¹⁹ The court disagreed because Illinois law forbade nonprofit corporations from having stock. The court refused to expand the broad interpretation of this clause as it was used in the *Philadelphia National Bank* case.¹²⁰

Judge Posner wrote for the court in *Rockford Memorial Corp.*, in which he provides a complete analysis of the application of section seven, generally to nonprofit companies, but specifically to nonprofit hospitals.¹²¹ Posner suggests that assuming that the language in section seven of the Clayton Act, which states, "person[s] subject to the jurisdiction of the FTC," refers to the FTC Act, disregards the plausibility that the language in section seven may be referring to the language in section eleven of the Clayton Act.¹²² Section eleven grants jurisdiction to five agencies over specified violations of the enumerated section; in this list the FTC's jurisdiction appears to be a catchall for the items not listed.¹²³

¹¹³F.T.C. v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

¹¹⁴*Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *49 (discussing University Health, Inc., 938 F.2d at 1206).

¹¹⁵*Id.*

¹¹⁶*Id.* at *49-50.

¹¹⁷*United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990).

¹¹⁸*Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *50.

¹¹⁹*Id.*

¹²⁰*Id.* at *50-51. *See generally Philadelphia National Bank*, 374 U.S. at 321.

¹²¹*In re Adventist Health Sys.*, 114 F.T.C. at 481.

¹²²*Id.* (quoting *Rockford Mem'l Corp.*, 898 F.2d at 1280-81). *See also* 15 U.S.C. § 21 (2001).

¹²³*In re Adventist Health Sys.*, 114 F.T.C. at 481 (quoting *Rockford Mem'l Corp.*, 898 F.2d at 1280-81).

This section of the Clayton Act also describes the procedures these enforcing bodies must follow.¹²⁴ These procedures apply to the Clayton Act, absent any other procedural Acts with regards to these agencies.¹²⁵ Thus, when Congress, in 1950, expanded section seven, it did the same with section eleven.¹²⁶ Therefore, the asset acquisitions that will be exempt from the jurisdiction of these agencies are those set forth in section eleven, and not those exempted by any other procedural act applicable to these agencies outside the Clayton Act.¹²⁷ Applying this rationale, hospital mergers are not exempt, because section eleven of the Clayton Act does not state an exemption from the FTC's jurisdiction for such mergers and acquisitions.¹²⁸ Section eleven put limitations on the FTC's jurisdictional reach, by stating that jurisdiction lies with other agencies in regards to industries which these agencies regulate. The statute makes no mention of nonprofit companies. Thus, the catchall language of section eleven vests jurisdiction over these matters in the FTC.¹²⁹

Although the court's analysis of the application of section seven and eleven of the Clayton Act in this case constitutes dicta, the analysis must still be given due consideration by the FTC.¹³⁰ The Seventh Circuit affirmed the district court's injunction. The court based its decision on an analysis under section one of the Sherman Act.¹³¹

The third case discussing asset acquisition with not-for-profit hospitals is *United States v. Carilion Health System*.¹³² In this case the DOJ brought an antitrust claim under section one of the Sherman Act and under section seven of the Clayton Act, to enjoin the consolidation of two nonprofit hospitals in Roanoke, Virginia.¹³³ The district court granted dismissal for the defendant, because it found that in an acquisition of a nonprofit hospital there is no stock involved, and thus section seven of the Clayton Act did not apply.¹³⁴ The district court further held that the acquisition clause of section seven did not apply, because the FTC did not have jurisdiction over nonprofit entities.¹³⁵ The district court did not state, in determining the jurisdictional issue, why it used the FTC Act as opposed to section eleven of the

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.* See also AREEDA & TURNER, ANTITRUST LAW at 109 n.2 (1989 Supp.).

¹²⁸*In re Adventist Health Sys.*, 114 F.T.C. at 481-82.

¹²⁹*Id.*

¹³⁰*Id.* at 482 (discussing *Rockford Mem'l Corp.*, 898 F.2d at 1280-81).

¹³¹*Id.* at *55-56 (discussing *Rockford Mem'l Corp.*, 898 F.2d at 1278).

¹³²*United States v. Carilion Health Sys.*, 707 F. Supp. 840 (W.D. Va. 1989), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989) (per curiam).

¹³³*Adventist Health Sys.*, No. 9234, 1991 F.T.C. LEXIS 354, at *55-56, (discussing *Carilion Health Sys.*, 707 F. Supp. at 840).

¹³⁴*Id.* at *56 (discussing *Carilion Health Sys.*, 707 F. Supp. at 840).

¹³⁵*Id.* See generally *Carilion Health Sys.*, 707 F. Supp. at 840.

Clayton Act.¹³⁶ After the district court's decision, the government appealed to the Fourth Circuit, which affirmed the district court's decision, and failed to address the issue regarding section seven of the Clayton Act.¹³⁷

III. THE GOVERNMENT'S PRIMA FACIE CASE

In a federal claim, the FTC typically seeks injunctive relief. This section discusses the elements the government must prove to prevail on the merits of a section seven claim. First, the FTC may establish its prima facie case by demonstrating through statistical analysis, that the entity created through the proposed merger would control an undue percentage of the relevant market, thus causing an increase in that entity's concentration of power over a particular product and geographical market.¹³⁸ In order for the FTC to be successful on a claim under section seven of the Clayton Act, it must also illustrate that the proposed merger or acquisition will realistically result in the significant lessening of competition in the relevant market in the future.¹³⁹

A. *Definition of the Relevant Market*

The described analysis determines whether an entity is attempting to monopolize or impair competition, resulting in the control of an excessive proportion of the relevant market.¹⁴⁰ Determining exactly what constitutes the relevant market is extraordinarily fact specific, and thus is a factual question to be determined by a jury.¹⁴¹ The burden of proving the relevant market rests on the antitrust plaintiff, including the DOJ and the FTC.¹⁴² As with any determination of fact by a jury, it may only be overturned if that decision is found to be clearly erroneous.¹⁴³ Once the jury has made all of its factual determinations, and neither party disputes any of those decisions, then the court may decide the remaining issue of the market definition as a matter of law.¹⁴⁴

¹³⁶*Id.* at *57.

¹³⁷*Id.* at *58.

¹³⁸*F.T.C. v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1289 (W.D. Mich. 1996).

¹³⁹*Id.* (citing *F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995) (quoting *Federal Trade Comm'n v. Nat'l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979)); *Federal Trade Comm'n v. University Health Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

¹⁴⁰BENDER, *supra* note 48, at § 24.01(4)(a).

¹⁴¹*Id.*

¹⁴²*Id.* § 24.01(4)(b). See also *E. I. Du Pont de Nemours and Co.*, 353 U.S. at 586; *International Boxing Club v. United States*, 358 U.S. 242, 250 (1959); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993); *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 499-500 (6th Cir. 1983); *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 683, 691 (8th Cir. 1993), *reh,g denied*.

¹⁴³*Id.*

¹⁴⁴*Id.*

In defining the relevant market, the court seeks to identify other competitors that the defendant's target consumer could turn to in the event that the merged entity tried to use its new market power to raise prices above competitive levels.¹⁴⁵ Two aspects define the relevant market: the product market and the geographic market.¹⁴⁶ If the relevant market has been properly defined it will not include potential suppliers who provide a product or service that varies too greatly from that of the defendant (the product market), or potential suppliers that are too far away from the defendant (geographic market). Said supplier will also not change its practice to tender defendant's customers a comparable alternative to defendant's product or service.¹⁴⁷

1. Relevant Product Market

The first aspect of the relevant market is the relevant product market. Because neither the Sherman Act nor the Clayton Act contains the necessary definition of either market, courts determined the definition of the relevant market.¹⁴⁸ In the two vital decisions of *Cellophane* and *Brown Shoe*, the Supreme Court enunciated the principles that controlled the definition of the relevant product market.¹⁴⁹ Although the Supreme Court determined how to define the relevant product market, that definition was vague. This vague definition makes it difficult to determine the exact reach of the court's definition. Thus, there had to be a means to define the outer limits of such market.¹⁵⁰ Three tests were adopted to define the boundaries of the definition created by the Court: the "reasonable interchangeability of use," the "cross-elasticity of demand" test, and the "cluster test."¹⁵¹

It is easier to understand the first two tests if discussed together. A cursory glance at these two tests demonstrates their importance. The rub of the "reasonable interchangeability" test is the physical characteristics and applications of the product.¹⁵² Also, under this test, the product market will include products or services that can be easily interchanged with the defendant's product or service, taking into consideration price, use, and quality.¹⁵³ The "cross-elasticity of demand" test does

¹⁴⁵*Butterworth Health Corp.*, 946 F. Supp. at 1290 (citing *United States v. Mercy Health Services*, 902 F Supp. 968, 975 (N.D. Iowa 1995)).

¹⁴⁶*Butterworth Health Corp.*, 946 F. Supp. 1285, at 1290 (citing *Federal Trade Comm'n v. Freeman Hosp.*, 69 F.3d 260, at 266-67 (8th Cir. 1995)).

¹⁴⁷*Butterworth Health Corp.*, 946 F. Supp. at 1290 (quoting *United States v. Mercy Health Services*, 902 F Supp. 968, 975-76 (N.D. Iowa 1995)).

¹⁴⁸BENDER, *supra* note 48, at § 24.02 (citations omitted). See generally *Brown Shoe Co.*, 370 U.S. at 294 (stating that for the purposes of section 7 of the Clayton Act "line of commerce" means the relevant product market, and "section of the country" is referring to the geographic market).

¹⁴⁹*Id.*

¹⁵⁰See generally, BENDER, *supra* note 43, at § 24.02 (citations omitted).

¹⁵¹*Id.*

¹⁵²BENDER, *supra* note 43, at § 24.02 (quoting *E. I. Du Pont de Nemours and Co.*, 351 U.S. at 404).

¹⁵³*Id.*

not focus on the physical characteristics of the product, but rather focuses on the price of the product, and how the sales of one product will change in response to a variance in price of another product.¹⁵⁴ Both tests determine what conditions will force the consumer to choose one product over another.¹⁵⁵ A high cross-elasticity of demand shows that the products are in the same relevant product market. A low cross-elasticity of demand demonstrates that the products are within different product markets.¹⁵⁶

The third and most relevant test is the “cluster test,” that presumes that a product market can be composed of an assemblage or “cluster” of products or services usually provided to the consumer as a group.¹⁵⁷ The “cluster test” is typically used in defining the product market involving the mergers of commercial banks and other financial institutions. Lower courts broadened the scope of this test to include the product market of acute-care inpatient hospital services when discussing the merger of two or more such hospitals.¹⁵⁸ These lower court cases demonstrate that this test is best used when defining a product market that is comprised of a group of products or services that are related to one another (not interchangeable, but complimentary to one another), and where this group of products or services maintains a customer base distinct from that of the products or services individually.¹⁵⁹

2. Relevant Geographic Market

The other aspect of the relevant market is the geographic market. Section seven of the Clayton Act prohibits any acquisition that could potentially lessen commerce “in any section of the country.”¹⁶⁰ Courts interpret this phrase to refer to the geographic market.¹⁶¹ The Supreme Court defined the relevant geographic market to be the area in which the providers of a particular product or service compete with one another, and the area to which the consumers could potentially turn for an alternative product or service as a result of a price increase.¹⁶² A proper

¹⁵⁴*Id.*

¹⁵⁵BENDER, *supra* note 43, at § 24.02 (citations omitted).

¹⁵⁶*Id.* at § 24.02(2)(e) (citations omitted).

¹⁵⁷*Id.* at § 24.02(3) (citing *Philadelphia National Bank*, 374 U.S. at 321).

¹⁵⁸*Id.* at § 24.02(3) (citations omitted).

¹⁵⁹*Id.*

¹⁶⁰*See generally* 15 U.S.C. § 18(III)(A)(14) (2001) (citing *Brown Shoe Co.*, 370 U.S. at 294).

¹⁶¹*Id.*

¹⁶²BENDER, *supra* note 48, at § 24.03 (citing *United States v. Connecticut Nat’l Bank*, 418 U.S. 656, 668 (1974) (relevant markets are where the merging party operates and to which the bulk of its customers may turn for alternative services); *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 363 (1970) (area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (area of effective competition in the known line

determination of the relevant geographic market includes a necessary finding that such market is consistent with the “commercial realities” of the trade, and that it embodies an “economically significant” commerce area.¹⁶³ Courts look to many factors in determining the relevant geographic market, including transportation costs, the entity’s history of entering into new areas, and where consumers might go in the event of a price increase by the merged entity.¹⁶⁴ With respect to the health care industry, most courts define the geographic market to be the area where patients can turn to other health care providers for acute-care inpatient services, in the event of a merger or acquisition between hospitals resulting in a price increase in said care.¹⁶⁵

a. Elzinga-Hogarty Two-Part Test

In determining the relevant geographic market, most courts use the two-part Elzinga-Hogarty test,¹⁶⁶ which utilizes expert testimony to determine the relevant geographic market in a particular case.¹⁶⁷ The first prong of the test, as used in cases involving merging hospitals, requires a determination of the hospital’s “service area:” the places from which the hospitals draw their patients.¹⁶⁸ In order to determine the service area, an expert witness examines the zip codes of discharged patients released from the defendant’s hospitals.¹⁶⁹ The expert organizes those zip codes to create a preliminary map of the service area.¹⁷⁰ If any other hospitals fall within the preliminary map, the same process will be done with those hospitals to create a complete service area map of all the hospitals.¹⁷¹

of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (geographic market is defined as an “area of effective competition ... such an area is not subject to definition by metes and bounds, it is the locale in which consumers of a product or service can turn for alternative sources of supply” (citations omitted)); *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 501 (6th Cir. 1983) (“The central rubric in evaluating the relevant geographic market was stated in *Tampa Electric* as follows: “[T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”).

¹⁶³BENDER, *supra* note 43, at § 24.03(1) (citations omitted).

¹⁶⁴*Id.*

¹⁶⁵Alexander, *supra* note 2, at 88 (citing *Freeman Hosp.*, 69 F.3d at 268).

¹⁶⁶*Freeman Hosp.*, 69 F.3d at 264. “A method devised by professors of economics Kenneth G. Elzinga and Thomas F. Hogarty to analyze patterns of consumer origin and destination and to identify relevant competitors of the merging entities.” *Id.*

¹⁶⁷Alexander, *supra* note 2 at 88 (citing *Freeman Hosp.*, 69 F.3d at 264).

¹⁶⁸*Freeman Hosp.*, 69 F.3d at 264.

¹⁶⁹*Id.* See also Alexander, *supra* note 2, at 88.

¹⁷⁰*Id.*

¹⁷¹*Id.*

The second prong of the test requires the expert to determine where the patients in the service area go for health care.¹⁷² The expert under this prong of the test, as with the first prong, will use the zip code information of the patients to determine what percentage of the people in the service area, determined above, utilized hospital services in the established geographic area.¹⁷³ In order for a relevant geographic market to exist, seventy-five percent of the patients in the service area must use hospitals within that area.¹⁷⁴ A showing of seventy-five percent represents a weak market, whereas ninety percent represents a strong market.¹⁷⁵

3. Market Concentration

After defining the relevant market, the plaintiff must prove the market concentration of the potential merged entity. In order for the FTC to establish its prima facie case, it must demonstrate that the result of a proposed merger will be “a significant increase in the concentration of power in the relevant markets and repose in the merged entity an undue share of the markets.”¹⁷⁶ The majority of courts rely on the use of the Herfindahl-Hirschman Index (HHI) to determine the market share controlled by any particular entity.¹⁷⁷ To calculate the HHI for a given market, the percentage of the market share controlled by each competitor is squared, then the resulting numbers are added together.¹⁷⁸ Under the FTC Merger Guidelines,¹⁷⁹ an

¹⁷²*Id.*

¹⁷³Alexander, *supra* note 2, at 88-89 (citing *Freeman Hosp.*, 69 F.3d at 265).

¹⁷⁴Alexander, *supra* note 2, at 89 (citing *Butterworth Health Corp.*, 946 F. Supp. at 1292). See also *Butterworth Health Corp.*, 946 F. Supp. at 1292 (“Definition of the relevant geographic market does not stop here however. In addition to historical patient flow data, the Court must also consider evidence suggesting how consumers would respond to price increases by the merged entity.”) (citing *Freeman Hosp.*, 69 F.3d at 268-69; *United States v. Mercy Health Services*, 902 F. Supp. 968, 978 (N.D. Iowa 1995)).

¹⁷⁵*Id.*

¹⁷⁶*Butterworth Health Corp.*, 946 F. Supp. at 1294 (citing *University Health*, 938 F.2d at 1218.)

¹⁷⁷Alexander, *supra* note 2, at 89.

¹⁷⁸*Butterworth Health Corp.*, 946 F. Supp. at 1294. The following is an example of the application of the HHI. If there were six firms in a market with the following market shares of, twenty-five percent, twenty percent, twenty percent, fifteen percent, ten percent, and ten percent, the HHI would be equal to 1,850, represented numerically as $(25^2 + 20^2 + 20^2 + 15^2 + 10^2 + 10^2 = 1,850)$. Therefore if the entity with the twenty-five percent market share merged with one of the entities with the ten percent market share it would create a 500 point difference between the pre and post-merger HHI. This creates a rebuttable presumption of market power and the use thereof.

¹⁷⁹BENDER, *supra* note 43, at § 70.05 (quoting U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 1 § A (1996), reprinted in 4 Trade Reg. Rep. (CCH) at 13, 153 and in ANTITRUST PRIMARY SOURCE PAMPHLET). It must be noted that there are “safety zones” set forth by the Justice Department and the FTC which protect mergers “between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds over the three most recent years, (2) has an average daily inpatient census of fewer than 40 patients over the

HHI, greater than 1,800 before the proposed merger represents a highly concentrated market. Likewise, the FTC views a merger that will result in an HHI increase of 100 points or more as likely to create or augment market power or aid its exercise.¹⁸⁰

In *Federal Trade Commission v. Butterworth Health Corporation*,¹⁸¹ the court applied the HHI index and accepted the expert's testimony that Butterworth and Blodgett, two hospitals proposing a merger, controlled over forty-seven to sixty-five percent of the relevant market, defined as "general acute-care inpatient hospital services in greater Kent County[Michigan]." ¹⁸² The estimated HHI for this market, post-merger, was within the range of 2,767 to 4,521, which demonstrated a potential increase of between 1,064 and 1,889 points.¹⁸³ The expert also determined, as to the "primary care inpatient hospital market," that the proposed merged entity would control sixty-five to seventy percent of that market.¹⁸⁴ If the proposed merger was not enjoined, the HHI for the "primary care inpatient hospital market" would increase to between 4,506 and 5,079, representing an increase of 1,675 to 2,001 points.¹⁸⁵ Based on this evidence, the expert predicted that the result of the proposed merger would be a highly concentrated market. Thus, "the FTC established its prima facie case that the proposed merger would violate section seven of the Clayton Act."¹⁸⁶

The establishment of the FTC's prima facie case creates a rebuttable presumption of illegality.¹⁸⁷ The burden then shifts to the defendant to rebut the presumption of a section seven Clayton Act violation.¹⁸⁸ At this point, the court considers any evidence by the defendant of ease of entry into the market for new competitors.¹⁸⁹ If the defendant successfully provides the necessary evidence to invalidate the presumption, then the burden of proof shifts back to the FTC.¹⁹⁰

three most recent years and that the hospital is more than five years old." Such a merger will be protected from antitrust claims by the government. *Id.*

¹⁸⁰*Id.*

¹⁸¹*Butterworth Health Corp.*, 946 F. Supp. at 1285.

¹⁸²*Id.* at 1294.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Butterworth Health Corp.*, 946 F. Supp. at 1294.

¹⁸⁷*Id.* at 1289 (citations omitted).

¹⁸⁸See generally *University Health, Inc.*, 938 F.2d at 1206; *Butterworth Health Corp.*, 946 F. Supp. at 1285.

¹⁸⁹*Id.*

¹⁹⁰*Id.*

IV. CLEVELAND CLINIC HEALTH SYSTEM (CCHS) AND ITS SUBSIDIARIES

The Cleveland Clinic Health System opened its doors in 1997.¹⁹¹ CCHS is a non-profit organization located in Cleveland, Ohio, with annual revenue in excess of \$2.2 billion.¹⁹² CCHS owns and operates numerous hospitals in the greater Cleveland area, including Euclid Hospital, Fairview Hospital, Hillcrest Hospital, Huron Hospital, Lakewood Hospital, Lutheran Hospital, Marymount Hospital, South Pointe Hospital, Cleveland Clinic Children's Hospital for Rehabilitation, and The Cleveland Clinic.¹⁹³

A. CCHS Affiliates

The Cleveland Clinic (The Clinic) is a 954 bed hospital, located on Euclid Avenue in Cleveland, Ohio. Founded in 1921, the Clinic began as a private, nonprofit organization, which incorporates clinical and hospital care with education and research.¹⁹⁴ Annually, the Cleveland Clinic has more than 1.2 million outpatient visits, and also has over 50,000 inpatient admissions from all over the United States and from more than eighty countries, generating over \$2.3 billion in revenue from patient care alone.¹⁹⁵ The Clinic has received a great deal of recognition from U.S. News & World Report and has been named one of the top six hospitals in the country for the past eleven years.¹⁹⁶ The Clinic is also the only hospital in Ohio to be named one of the "Best Hospitals in America," according to the magazine.¹⁹⁷ In addition to the main hospital campus near downtown Cleveland, the Clinic has family health centers and surgery centers located throughout Cleveland's surrounding suburbs.¹⁹⁸

The Clinic has a laundry list of specialty areas that it provides, including: cancer, cardiology, colorectal surgery, dentistry, dermatology, emergency medicine, endocrinology, gastroenterology, general surgery, gynecology and obstetrics, hematology and medical oncology, infectious disease, nephrology and hypertension, neurology and neurological surgery, ophthalmology, orthopaedic surgery,

¹⁹¹CLEVELAND CLINIC HEALTH SYSTEM DESCRIPTION, at <http://www.fairviewhospital.org/description/> (last visited Feb. 5, 2002).

¹⁹²Diane Solov, *To Submit Offers to Buy Hospitals*, THE PLAIN DEALER, April 26, 2000, at 1A.

¹⁹³CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

¹⁹⁴THE CLEVELAND CLINIC, EVERY LIFE DESERVES WORLD CLASS CARE, at <http://www.clevelandclinic.org/home/maincampus.htm> (last modified Feb. 2, 2002). *See also* CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

¹⁹⁵CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4. *See also* ADH.COM, AMERICAN HOSPITAL DIRECTORY, at http://www.ahd.com/free2.php3?id=0006410670&mname=&mcity=&mstate=OH&mzip=&mphone=&name=CLEVELAND+CLINIC+FOUNDATION&hcfa_id=360180 (last visited Feb. 5, 2002).

¹⁹⁶CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

¹⁹⁷*Id.*

¹⁹⁸*Id.*

otolaryngology, pediatrics and all pediatric sub-specialties, plastic and reconstructive surgery, pulmonology, radiation oncology, radiology, rehabilitation, rheumatic and immunologic disease, thoracic and cardiovascular surgery, transplantation, urology, vascular medicine and vascular surgery.¹⁹⁹ Taking into account the number of staffed beds and the numerous specialty areas that the Clinic provides, the Clinic ranks as the largest hospital in Cleveland.²⁰⁰

In 1998, the Cleveland Clinic Health System added the Cleveland Clinic Children's Hospital for Rehabilitation, formally named Health Hill Hospital. In September of 1999, the hospital changed its name to its current designation.²⁰¹ The Cleveland Clinic Children's Hospital for Rehabilitation is a fifty-two bed, non-profit organization and "the region's premier provider of comprehensive pediatric, medical and rehabilitative services for children with chronic illnesses and disabilities (including those caused by trauma; birth defects, brain and spinal cord injury; and respiratory, orthopaedic, neuromuscular and developmental disorders)."²⁰² The Children's Hospital is one of the few hospitals in the United States that provide accredited pediatric services.²⁰³

Euclid Hospital, originally named Glenville Hospital, was established in 1907, and built at its current location in 1952.²⁰⁴ Now a member of CCHS, Euclid Hospital houses 371 licensed beds.²⁰⁵ This hospital offers a number of medical services including: emergency services, surgery, acute-care, sub-acute-care, rehabilitation, and outpatient care.²⁰⁶

Fairview Hospital, an acute-care hospital located in Westlake, Ohio contains 469 licensed beds. Significantly, Fairview has been a part of the Cleveland community for over 100 years.²⁰⁷ Only recently did Fairview become part of CCHS.²⁰⁸ Fairview Hospital includes an Emergency department that also provides a Level II trauma center and a FastER Care program. The FastER program provides services to

¹⁹⁹*Id.*

²⁰⁰See generally, AHD.COM, *American Hospital Directory*, at <http://www.ahd.com/list.php3?mname=&mcity=&mstate=OH&mzip=&mphone=&B1=Submit+Query> (last visited Feb. 6, 2002).

²⁰¹CLEVELAND CLINIC CHILDREN'S HOSPITAL FOR REHABILITATION, ABOUT US, at http://www.clevelandclinic.org/childrensrehab/content/health_hill.asp?linkNum=2&loc=about (last modified March 6, 2001).

²⁰²CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²⁰³ CLEVELAND CLINIC CHILDREN'S HOSPITAL FOR REHABILITATION, *supra* note 201.

²⁰⁴EUCLID HOSPITAL, ABOUT EUCLID HOSPITAL, at http://www.euclidhospital.org/about/frame_main_About.htm (last visited April 29, 2004).

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷FAIRVIEW HOSPITAL, GET TO KNOW FAIRVIEW, at <http://www.fairviewhospital.org/information/> (last visited April 29, 2004).

²⁰⁸*Id.*

patients with less severe injuries and ailments.²⁰⁹ Fairview Hospital also maintains a hospital-based surgery center, and a top-of-the-line outpatient surgery center.²¹⁰ Every year this hospital provides inpatient, outpatient, and emergency care to well over 300,000 patients.²¹¹

Hillcrest Hospital began in 1968 as a nonprofit organization in Mayfield Heights, Ohio. Hillcrest maintains 347 full-service staffed beds.²¹² Hillcrest offers a great deal of health care services, which include: “laser and outpatient surgery, a maternity center, a Neonatal Intensive Care [unit], a pediatrics unit, an invitro fertilization program, a Women’s Resource Center, and digestive health centers, state-of-the-art radiology services, a Level II trauma center, comprehensive cardiovascular services (open heart surgery, intensive care and coronary care units), and a cancer center.”²¹³ According to a survey done by HCIA, a leading company in providing information on the health care industry, during the last four out of five years, Hillcrest was named one the country’s top 100 hospitals.²¹⁴

Huron Hospital, established in 1874 and located on the former Rockefeller estate, is an acute-care teaching hospital with 211 licensed beds.²¹⁵ Huron Hospital practices in a number of specialty areas including: “Behavioral Health Services, including inpatient and outpatient mental health, chemical dependency and detoxification services, and Diabetes Education and Management,” which provide expert health care services to the community.²¹⁶ Huron bears the distinction of being the only eastside hospital that provides hospital-based 9-1-1 emergency services.²¹⁷ It also has a well-trained Emergency Medical Service (EMS) crew that responds to the emergency calls of East Cleveland and Bratenahl, transporting those patients to the hospital’s Level II Trauma Center.²¹⁸ As a Level II Trauma Center, Huron hospital may treat the most severe life and limb-threatening injuries.²¹⁹

²⁰⁹CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.* See also HILLCREST HOSPITAL, ABOUT HILLCREST HOSPITAL, at <http://www.hillcresthospital.org/> (last visited April 29, 2004).

²¹³HILLCREST HOSPITAL, ABOUT HILLCREST HOSPITAL, at <http://www.hillcresthospital.org/> (last visited April 29, 2004).

²¹⁴CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²¹⁵HURON HOSPITAL, A GOOD SIGN ON THE ROAD TO BETTER HEALTH CARE, at <http://www.huronhospital.org/> (last visited April 29, 2004).

²¹⁶CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²¹⁷HURON HOSPITAL, *supra* note 215.

²¹⁸*Id.*

²¹⁹*Id.*

Lakewood Hospital, a 400-bed acute-care hospital, was founded in 1907.²²⁰ Located on the Westside of Cleveland, Lakewood practices in a number of specialty areas, including: “Behavioral medicine, accredited diabetes education and management, emergency services, Level II trauma center, geriatric medicine, home care, maternal and child health, orthopedics, rehabilitation services, skilled nursing facility, surgical specialties.”²²¹ As a member of CCHS, Lakewood prides itself on being a community-based hospital providing the highest quality of care to the Westside of Cleveland.²²²

Lutheran Hospital was established in 1896 and serves downtown Cleveland, Ohio City, and Cleveland’s Westside.²²³ Lutheran is a 219-bed, acute-care hospital providing a large array of primary health care, including; “Adult and geriatric behavioral health, primary care services, emergency medicine, orthopedic and spine care, pain management, physical and occupational therapy, rehabilitation services, sports medicine, urology.”²²⁴ Lutheran has just recently become a member of CCHS.²²⁵

Founded in 1949 by the Sisters of Saint Joseph, TOSF, Marymount Hospital is a nonprofit Catholic hospital, providing acute-care services to Southern and Southeastern Cuyahoga County and the adjacent neighborhoods.²²⁶ Through the years, Marymount continued to grow and expand, allowing it to become a member of CCHS.²²⁷ Marymount currently offers “ambulatory and minimally invasive surgery, behavioral and occupational health, women’s services including mammography, obstetrics and gynecology, diagnostic cardiac catheterization, CT and MRI Imaging including a Regional Radiology Center, sports medicine and rehab, [and] endoscopy,” along with numerous other programs to provide top-of-the-line health care in the Southern Cuyahoga County area.²²⁸

South Pointe Hospital, created in 1994 with the merger of Brentwood and Meridia Suburban hospitals, is a teaching hospital, affiliated with Ohio University College of Osteopathic Medicine. South Pointe contains 223 licensed beds.²²⁹ This hospital provides a wide range of medical and surgical services to the area including: “cancer care, cardiac care, coronary/intensive care, emergency medicine,

²²⁰LAKWOOD HOSPITAL, GET TO KNOW LAKEWOOD, at <http://www.lakewoodhospital.org/lakewood/> (last visited April 29, 2004).

²²¹CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²²²LAKWOOD HOSPITAL, *supra* note 220.

²²³CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²²⁴*Id.*

²²⁵LUTHERAN HOSPITAL, CLEVELAND’S DOWNTOWN HOSPITAL IN THE HEART OF OHIO CITY, at <http://www.lutheranhospital.org/get/> (last visited Feb. 6, 2002).

²²⁶CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²²⁷*See generally* MARYMOUNT HOSPITAL, ABOUT US, at <http://www.marymount.org/About/index.htm> (last visited Feb. 6, 2002).

²²⁸CLEVELAND CLINIC HEALTH SYSTEM, *supra* note 4.

²²⁹*Id.*

rehabilitation and surgery.”²³⁰ South Pointe is currently expanding its facilities, with a projected completion date of 2003.²³¹ The construction project is estimated to cost \$30 million.²³²

B. Major Competitors

CCHS competes with two major health systems in northeast Ohio. The first competitor is University Hospitals Health System (UHHS). Located in northeast Ohio, UHHS facilitates eleven hospitals: University Hospitals of Cleveland, which also consists of the Alfred and Norma Lerner Tower, Lakeside Hospital, Samuel Mather Pavilion, MacDonald Women’s Hospital, Rainbow Babies & Children’s Hospital, Ireland Cancer Center, Psychiatric Center at Hanna Pavilion; UHHS Bedford Medical Center, UHHS Brown Memorial Hospital, UHHS Geauga Regional Hospital, UHHS Memorial Hospital of Geneva, UHHS Laurelwood Hospital, Southwest General Health Center, Mercy Medical Center, St. John West Shore Hospital, St. Vincent Charity Hospital, Saint Luke’s Emergency Center, are also affiliated with UHHS.²³³ Similar to CCHS, UHHS provides a wide range of health care services to the community through the partnering of local area hospitals.²³⁴

The second major CCHS competitor is Metro Health System (MHS). MHS opened in 1837 as City Hospital.²³⁵ MHS is also one of the leading health care providers in northeast Ohio.²³⁶ MHS consists of: MetroHealth Medical Center, MetroHealth West Park Medical, Building, MetroHealth Asia Plaza Health, Care Clinic, MetroHealth Southwest Medical Group, and MetroHealth Brooklyn Medical Group.²³⁷ Similar to its two competitors, MHS provides an extensive array of health care services to the community, but differs from the other two in that one of its listed goals is to control the cost of health care.²³⁸ These three major health care providers in northeast Ohio compete for control over the product market discussed herein.

²³⁰SOUTH POINTE HOSPITAL, ABOUT SOUTH POINTE HOSPITAL, at <http://www.southpointehospital.org/> (last visited April 29, 2004).

²³¹*Id.*

²³²*Id.*

²³³*See* UNIVERSITY HOSPITAL HEALTH SYSTEM, UHHS SYSTEM-AT-A-GLANCE, at <http://www.uhhs.com/uhhs/system/glance.html> (last visited Feb 25, 2002).

²³⁴UNIVERSITY HOSPITAL HEALTH SYSTEM, ABOUT UNIVERSITY HOSPITAL HEALTH SYSTEM, at <http://www.uhhs.com/uhhs/index.html> (last visited April 29, 2004).

²³⁵METROHEALTH SYSTEM, WELCOME TO THE METROHEALTH SYSTEM, at <http://www.metrohealth.org/tour/page1.asp> (last visited Feb 25, 2002).

²³⁶*Id.*

²³⁷*See* METROHEALTH at <http://www.metrohealth.org/tour/page11.asp> (last visited April 29, 2004).

²³⁸*See* METROHEALTH SYSTEM, MISSION AND VISION STATEMENTS, at <http://www.metrohealth.org/general/overview/mission.asp> (last visited April 29, 2004).

C. Recent Developments

Some of the most recent activity by CCHS occurred in May 2000, when Bankruptcy Judge Mary F. Walrath approved CCHS' bid of \$52.65 million to purchase the Integrated Medical Campus in Beachwood, Ohio, which was formerly part of, now bankrupt, Primary Health Systems (PHS).²³⁹ Prior to this order by the court, CCHS attempted to purchase the Integrated Medical Campus in Beachwood, St. Michael Hospital in Slavic Village, and Mt. Sinai Medical Center East in Richmond Heights for \$62 million.²⁴⁰ Although providing no evidence of bad-faith on the part of CCHS, the Bankruptcy court supplied numerous instances where PHS was less than honest.²⁴¹ PHS was given a thirty-day timeframe during which it could seek bids for the three entities (St. Michaels Hospital located in Slavic Village; Mt. Sinai Medical Center East situated in Richmond Heights; and the Integrated Medical Campus in Beachwood).²⁴² Despite the fact that the end result here appeared to benefit all involved, including the community, the negotiations between CCHS and PHS had a high potential to end with an anticompetitive outcome.

V. ANALYSIS AND APPLICATION OF CURRENT LAW TO A POTENTIAL ACQUISITION BY CCHS OF ANOTHER LOCAL AREA HOSPITAL

This analysis assumes that the FTC has jurisdiction over a nonprofit organization. This assumption is based on the relevant case law, and language set forth in Section eleven of the Clayton Act. If the FTC sought a preliminary injunction against an acquisition proposed by CCHS to acquire another acute-care facility, the court would have to determine the likelihood of the FTC's ultimate success on the merits. Specifically, the FTC would be required to demonstrate that the proposed merger would result in the substantial lessening of competition in the relevant market in the future.²⁴³ Initially, the burden of proof rests on the FTC.²⁴⁴ The FTC must prove that following the merger, CCHS would control an undue share of the Cleveland area's relative market, including both the product and geographic markets.

The background information previously discussed on the hospitals owned by CCHS, would permit the FTC to define two relative product markets. The first product market would be the market for "general acute-care inpatient hospital services." The FTC defines this market as a general accumulation of diverse services and qualifications that are essential to provide the necessary medical and surgical needs, as well as other services required by inpatients, e.g., anesthesia, intensive care capabilities, lodging, operating rooms, pharmaceuticals, and 24-hour

²³⁹Diane Solov et al., *Sinai-East St. Michael Win New Lifer; Nine-Minute Auction Ends Hospital Fight*, THE PLAIN DEALER, May 2, 2000, at 1A.

²⁴⁰*See generally* Editorial, *Bidding For Fairness; Bankruptcy Court's Decision to Auction Hospitals is Best for Creditors, Competitors and the Public*, THE PLAIN DEALER, Mar. 31, 2000, at 10B.

²⁴¹*Id.*

²⁴²*Id.*

²⁴³*Butterworth Health Corp.*, 946 F. Supp., at 1289 (citations omitted).

²⁴⁴Alexander, *supra* note 2, at 104.

nursing care.²⁴⁵ With the application of the cluster test, these services and capabilities must be viewed as a group which the consumer would not be able to find a reasonable substitute for outside of a general acute-care hospital.²⁴⁶

The second market that the FTC would recognize is “primary-care inpatient hospital services.”²⁴⁷ The FTC defines primary-care services to consist of basic or standard inpatient hospital services offered at a majority of general acute-care hospitals, for example, normal childbirth, general medicine and general surgery.²⁴⁸ Because courts have recognized these markets in the past as suitable product markets for mergers within the health care industry, this aspect of the relative market will not be that difficult for the FTC to prove.²⁴⁹

The geographic market, on the other hand, requires a much more complex analysis in order to determine how far such a market reaches. The FTC, through expert testimony, would want to define the geographic market as narrowly as possible, giving CCHS control over a larger market share. On the contrary, CCHS would want to define the geographic market as broadly as possible.²⁵⁰ Even though the Elzinga-Hogarty test is the primary test used to determine the area defined as the geographic market, plaintiff’s expert and the defendant’s expert, as well the court, all may interpret the information differently.²⁵¹ If the court accepts CCHS’ expert testimony broadly defining the geographic market, this will not preclude the FTC from ultimately succeeding on the merits, but will result in an increased burden on the FTC to prove undue market control by the defendant. If the court is willing to accept the FTC’s expert testimony however, which narrowly defines the relevant geographic market, this eases the burden on the FTC to prove control over a disproportionate market share. The acceptance of either testimony results in the completion of the definition of the relevant market.

After adequately defining the relevant market, the FTC would then need to prove that the proposed acquisition would result in an increase in the concentration of power in the above-defined markets, giving CCHS excessive control over the market.²⁵² Next, an analysis of the relevant market concentration will be necessary. If for example, there are four competitors in the geographic market as defined above, each having an equal market share, this would translate into twenty-five percent for CCHS, twenty-five percent for University Hospital Health System (UHHS), twenty-five percent for Metro Health System (MHS), and twenty-five percent for the

²⁴⁵*Butterworth Health Corp.*, 946 F. Supp. at 1290.

²⁴⁶*Id.*

²⁴⁷*Id.*

²⁴⁸*Id.* at 1288.

²⁴⁹*Id.* at 1289 (citing *Freeman Hosp.*, 69 F.3d at 268; *University Health*, 938 F.2d at 1211; *Mercy Health Services*, 902 F. Supp. at 976).

²⁵⁰See generally Alexander, *supra* note 2, at 104.

²⁵¹*Id.* at 105.

²⁵²See generally *Butterworth Health Corp.*, 946 F. Supp. at 1294 (citing *Univ. Health*, 938 F.2d at 1218).

potential unnamed fourth. Applying the HHI, the resulting number is 2500.²⁵³ This result constitutes a concentrated market; any merger or acquisition within this market with an increase in the HHI by more than 100 points would raise a red flag for potential anticompetitive activities. Further, assuming that CCHS acquires one of the competitors, resulting in control of fifty percent of the relative product market, the resulting HHI would be 3,750, an increase of 1,250 points, which is a substantial increase in market power. This result would suffice to show excessive concentration.

Although the numbers set forth are strictly hypothetical, a March 2000 article established that prior to the purchase of Integrated Medical Campus in Beachwood, CCHS controlled sixty-two percent of the market share for hospital beds in the Cleveland area.²⁵⁴ Assuming that the percentage of CCHS market control has not changed as of today, this would leave thirty-eight percent to be divided among competitors in the geographic market. CCHS' two biggest competitors in the geographic market are UHHS and MHS. Based on the amount of the market that CCHS controls, this allows for the assumption that these two health systems together control a substantial amount of the remaining thirty-eight percent.²⁵⁵ Therefore, even if CCHS were to acquire another one percent of the market it would result in an increase of the HHI of over 100 points. The courts would view any such acquisition by CCHS as "likely to create or enhance market power or facilitate its exercise."²⁵⁶ Based on this HHI analysis, and assuming that the relevant market is proven, a court would likely conclude that the FTC satisfied its prima facie case. Again, once the FTC establishes its prima facie case, it creates a rebuttable presumption of illegality.²⁵⁷ The burden then shifts to the defendant to provide evidence that undercuts the extrapolative worth of the FTC's facts.²⁵⁸ If the defendant succeeds in providing the necessary evidence to invalidate the presumption, then the burden of proof shifts back to the FTC.²⁵⁹

²⁵³Shown numerically as $(25^2 + 25^2 + 25^2 + 25^2)$.

²⁵⁴Dennis J. Kucinich, *Rep. Kucinich Expands Federal Antitrust Probe Request*, at <http://www.house.gov/kucinich/press/hospital11.html> (last visited April 29, 2004).

²⁵⁵CCHS currently controls sixty-two percent of the market leaving thirty-eight percent remaining. Assuming that CCHS's two largest competitors, UHHS and MHS, control a large portion of the remaining thirty-eight percent, and that there is at least three other competitors in the market, the following is a numerical representation of the HHI before and after CCHS acquiring another one percent of the market: Before $(62^2 + 10^2 + 10^2 + 5^2 + 5^2 + 8^2 = 4158)$ after acquisition of another one percent of the market $(63^2 + 10^2 + 10^2 + 5^2 + 5^2 + 7^2 = 4268)$, a difference of 110.

²⁵⁶*Butterworth Health Corp.*, 946 F. Supp.1294.

²⁵⁷*Id.* at 1289 (citations omitted).

²⁵⁸*Id.*

²⁵⁹*Id.*

A. Defenses

CCHS may raise two potential defenses to shield its merger actions. The first defense, termed the “failing company doctrine” states that the acquisition of stock of another company in failing conditions will be permissible if the defendant can prove the following: that recovery is improbable, that the acquisition is not detrimental to community, and that the acquisition does not significantly diminish competition or restrain commerce within objectives of section seven of the Clayton Act.²⁶⁰ The failing firm defense may be invoked if the defendant can prove that a corporation's capital and assets are so exhausted and the possibility of revitalization is so bleak that the company faces “grave probability of business failure.”²⁶¹

To employ this defense, the defendant must also show that without the merger or acquisition there is potential harm to the stockholders of the “failing” company and the community, and that defendant, as a competitor, is the only potential buyer available.²⁶² Also, the defendant must demonstrate that the purpose of the merger or acquisition is not to impair or lessen competition, but is consummated to assist the defendant's accrued business and to prevent harm to the public with the loss of a resource, without lessening competition or restraining commerce.²⁶³ Based on the description set forth above, CCHS would have a great deal of difficulty proving that the acquisition of as little as one percent of the market is for any of the purposes set forth above.

The second defense CCHS may utilize is the “efficiencies” defense. Assuming the FTC proves its prima facie case, then CCHS' acquisition of one percent of the market substantially lessens competition. Therefore, CCHS must prove that the consequences of the proposed merger have considerable economic effects that help competition, and thus the consumer.²⁶⁴ Operating cost reductions and elimination of duplicative equipment and departments are examples of economic efficiencies that may lower costs to consumers.²⁶⁵ Extensive research however, indicates no documentation of any such activity by CCHS. Therefore, unless CCHS were to show that the results of a proposed merger or acquisition were to enhance competition and help consumers, then the merger or acquisition should be permanently enjoined.

VI. CONCLUSION

This article first describes the origin and scope of the Sherman Antitrust Act and the Clayton Antitrust Act. Then it discusses the application of these Acts to different industries, most specifically the health care industry. Following that, this article establishes the FTC's jurisdiction over mergers of nonprofit companies. Finally, this

²⁶⁰ 15 U.S.C. § 18 (*citing* *International Shoe Co. v. F.T.C.*, 280 U.S. 291 (1930)).

²⁶¹ *Id.* at 302.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Alexander, *supra* note 2, at 98-99. See also *Butterworth Health Corp.*, 946 F. Supp. at 1300; *Carilion Health System*, 707 F. Supp. at 840.

analysis is applied to a possible merger between CCHS and another competitor within the geographic market established above.

Through this analysis, it appears that it would not be inordinately difficult for the FTC to establish a prima facie case against CCHS. A genuine concern may arise with CCHS' potential defenses. If the Bankruptcy Court had allowed CCHS to acquire all of PHS' assets, such an acquisition would certainly have given rise to numerous antitrust issues. The real FTC problem in this instance would not have been establishing proof of CCHS' undue control over the market, but rather rebutting CCHS' defense that PHS was a failing firm. By raising a "failing firm" defense, CCHS could be deemed to be helping to maintain, as opposed to hindering, a competitive market.

Another possible CCHS defense is a cost-efficiency defense, whereby CCHS could claim, and would ultimately have to prove, that the acquisition eliminated duplications in service, and thus reduced the costs to consumers. Although the burden of persuasion ultimately rest on the FTC, it will still be the responsibility of CCHS to prove that its actions were not anticompetitive in nature. In closing, it would behoove the FTC to keep a close watch on future CCHS activities.

MATTHEW T. POLITO