THE ANTITRUST LAWS AND NONPROFIT HOSPITALS

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INTRODUCTION

Antitrust plays an important role in our economy. Competition is the cornerstone of this country's economic foundation. We have long extolled the virtues of the free market, which provides business with the opportunity to innovate, produce, and distribute goods and services without direct intervention by the government. Competition, rather than government directives, determines which businesses will succeed, and consumers are the ultimate—and appropriate—beneficiaries of the competitive process.¹

— (former) Assistant Attorney General Joel I. Klein²
Foreword to Annual Report

The Department of Justice is one of the hardest working departments in the United States government. One of the most important divisions of the Department of Justice affecting the American consumer is the Antitrust Division. The Antitrust Division, as well as the Federal Trade Commission, is designed to promote competition in the free market.³ Promoting competition in the market is supposed to allow for more choice and freedom in the market for the consumer.

According to the 10-year workload statistics report for the fiscal year 1990-1999 produced by the Antitrust Division of the United States Department of Justice, FY 1999 was

²Id. (Former Assistant Attorney General, Department of Justice).
³See id.
record breaking. According to the report, approximately $1 billion in criminal fines was assessed, primarily from the prosecution of complex and harmful international cartels, and the number of pending civil trials and the complexity of the issues and matters they involve was, and continues to be, unprecedented in the last twenty years.

When the average American thinks of the antitrust laws, what does he or she think of? The majority of the time, he or she thinks of big businesses, such as computer corporations. One of the most recent and well-publicized cases brought by the Department of Justice has been United States v. Microsoft. This antitrust action alleged violations of the Sherman Act §§ 1 and 2, and various state statutes by the defendant Microsoft Corporation. As a result of the action, the district court ordered that the proper remedy against the defendant was conduct modification and structural reorganization including mandated divestiture.

With the ever changing marketplace new antitrust issues arise all the time. An area that is rapidly changing and developing and gaining more recognition in the antitrust area is the area of health care law. When thinking of the antitrust laws, the average person does not think of the health industry as a big business that has to be regulated by the antitrust laws. However, the Department of Justice and the Federal Trade Commission and various state agencies are continuously watching the health care industry for antitrust violations. Some examples of health

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4See http://www.usdoj.gov/atr/public/4504.htm
5See id.
7See Microsoft, 84 F. Supp. 2d at 12.
care antitrust litigation include actions against hospital organizations and doctor practice organizations. Antitrust litigation is becoming critical in this area because of the recent growth and changes in this area, including changes in Medicare and Medicaid. Antitrust litigation in the health care arena may have great affects the American public.

One aspect of the area of health care that has gained great recognition by the courts and legal and health academics in the past decade has been the area of hospital mergers. Of particular importance has been the area of mergers between two non-profit hospitals. Because of their unique nature, non-profit hospitals can be distinguished from their profit-making counterparts. Non-profit hospitals are community owned and run and are very distinguishable from big businesses out to make a profit. Because of this, there has been great debate both in the courts and with legal experts as to how and whether the antitrust laws should be applied to the mergers between two non-profit hospitals.

There are valid arguments both for and against applying the antitrust laws to non-profit hospital mergers. The main argument against applying the antitrust laws to these mergers is that non-profit hospitals are not profit maximizing. Their governing boards consist of community members who are not out to make a profit but to provide quality care at affordable prices for their community members. In addition, merging two non-profit hospitals, who otherwise are in financial trouble, yields greater efficiencies for the community — better care, better quality, and better use of resources.

One of the main arguments in favor of applying the antitrust laws to non-profit hospital mergers is that although the philosophy behind these hospitals is not profit maximizing, these hospitals will inevitably become profit maximizing. Even though these hospitals are governed
by community members, it is only human nature to want to make a profit. Once merged, these hospitals will raise prices in order to pay their managers more and to increase and better their technology and quality care.

The courts have been mixed in their decisions regarding whether to apply the antitrust laws to non-profit hospital mergers and whether the merging of certain non-profit hospitals violates those antitrust laws. In particular, the courts have left open the degree to which the hospitals’ non-profit status should be considered when deciding whether the merger violates the antitrust laws. No court has yet to hold that the hospitals’ non-profit status is the single determining factor as to whether the merger is not violative of the antitrust laws. However, several courts have alluded to the fact that the hospitals’ non-profit status is a very important factor. The United States Supreme Court has yet to rule on this issue, and it is unknown whether the Court ever will. However, the hospitals’ non-profit status and the efficiencies that the proposed merger will produce are and should be the most determinitive factors for the courts in deciding that these non-profit hospital mergers do not violate the antitrust laws, and further that for these reasons the antitrust laws probably should not apply to these specific types of mergers.

Although, because of the unique nature of non-profit hospitals, the antitrust laws as we know them should not apply to these types of mergers, this is not to say that there should be no checks on these kinds of mergers. There are presently Merger Guidelines and other checks in place to analyze these types of mergers. These checks are in place to ensure that the merger does not go against public policy and does not harm the public. The antitrust laws were enacted to protect against big businesses from taking over the market, non-profit hospitals are different and thus the antitrust laws do not apply to them in the same way.
Although it is my belief that the antitrust laws as they have been applied throughout history should not apply to non-profit hospital mergers, realistically speaking when looking at all of the issues involved, I know that not everyone would be convinced by such an argument. When looking at the changing nature of the health care industry, it is true that both the Legislature and the courts would be very reluctant to make a per se rule that the antitrust laws should not apply to these kinds of mergers. This paper explores the issue that the non-profit status of the hospitals (the “non-profit defense”) should be given much greater weight in deciding that the mergers do not violate the antitrust laws.

BACKGROUND

I. THE ANTITRUST LAWS

There are three basic laws that are essential in any antitrust discussion: the Sherman Act,\(^9\) the Clayton Act,\(^10\) and the Federal Trade Commission Act.\(^11\) These acts were enacted in response to the public’s concern of market control by certain limited corporations and individuals. The Sherman Antitrust Act was first enacted in 1890.\(^12\) It imposes criminal penalties and prohibits


\[^12\] See 15 U.S.C §1, which states:

 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 declared to be illegal. Every person who shall make any contract or engage in any combination 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 is 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.
contracts, combinations, or conspiracies that restrain trade or commerce.\textsuperscript{13} The Clayton Act is civil in nature and prohibits the formations of monopolies.\textsuperscript{14} The Federal Trade Commission Act is also civil in nature.\textsuperscript{15} This act prohibits unfair methods of competition.\textsuperscript{16} Both acts were enacted around 1914. In essence, these laws together prohibit exclusionary practices, boycotts, monopolies, horizontal price fixing, vertical price fixing, and tying arrangement, among other things.

One of the purposes of the antitrust laws is to ensure consumer choice in the market place. In order to ensure this choice, the antitrust laws set two basic requirements: "companies cannot agree to limit competition in ways that hurt consumers; and a single company cannot monopolize or try to monopolize an industry through unfair practices."\textsuperscript{17} Today's antitrust laws prohibit businesses from entering into agreements with one another in order to limit the market for the consumer. For example, a group of businesses cannot band together in order to establish prices.\textsuperscript{18} Today's antitrust laws also prohibit large companies from combining or merging in

\textsuperscript{13}Id.

\textsuperscript{14}See 15 U.S.C §§12-27.


\textsuperscript{16}See id.

\textsuperscript{17}See http://www.ftc.gov/compguide/intro.htm.

\textsuperscript{18}See id. (Some examples of this prohibited price fixing are automobile dealers in a city agreeing on the price charged for cars, domestic airlines agreeing on what flights they will offer in a particular city, internet service providers agreeing on the monthly terms for their customers, and clothing retailers agreeing with manufacturers about the minimum prices to be charged for clothing.) Id.
order to create a single company monopoly that will dominate the market.\textsuperscript{19} The antitrust laws apply to almost everyone who is involved in the business market.\textsuperscript{20}

A. Antitrust Laws Applied Through History

Antitrust issues have occurred in all areas of almost every market ranging anywhere from steel to professional sports to electronics. One of the first prominent antitrust cases in the United states was \textit{United States v. E.C. Knight Company}.\textsuperscript{21} This case involved the creation of a monopoly in the business of sugar refining.\textsuperscript{22} A prominent case in the professional sports arena was \textit{Federal Baseball Club of Baltimore, Inc v. National League of Professional Baseball Clubs}.\textsuperscript{23} In this case, the Court found that baseball was not considered interstate commerce and thus it was unconstitutional to apply the Sherman Act to the game of baseball.\textsuperscript{24} Thus, baseball was allowed to operate free of the antitrust laws.\textsuperscript{25}

Antitrust cases throughout American history do not only show the development of the antitrust laws through history, these cases also show the chronological development of the

\textsuperscript{19}See id. (For example, a manufacturer that acquires all of its competitors will be able to raise prices well beyond competitive levels.) \textit{Id}.

\textsuperscript{20}See id. (The laws apply to corporations, partnerships, sole proprietorships, individuals, trade associations, professionals such as doctors and lawyers, and even some non-profit organizations.) \textit{Id}.

\textsuperscript{21}156 U.S. 1 (1895).

\textsuperscript{22}See \textit{E.C.Knight Co.}, 156 U.S. 1.

\textsuperscript{23}259 U.S. 200 (1922).

\textsuperscript{24}Id.

\textsuperscript{25}The decision in \textit{Federal Baseball} has never been overruled per se, however the antitrust laws can reach baseball players. See 15 U.S.C. 7(27a) (1999), otherwise known as “The Curt Flood Act of 1998.”
American consumer market throughout history. The early cases involved the markets of sugar refining, steel production, and oil companies. Today's antitrust cases involve the markets of electronics, computers, and cyberspace. As the markets continue to develop and spread, antitrust legal issues will also continue to arise. However, as the markets continue to develop, they tend to become more complex, and as the markets become more complex, the issues become more complex as well. A recent example of this complexity is the Microsoft litigation.

B. The Most Recent Example Microsoft

On May 18, 1998, the United States Justice Department brought suit against the


27See Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899).


29See Microsoft, supra.

30In its complaint against Microsoft, the Department of Justice charged that Microsoft engaged in a pattern of anticompetitive acts including: "attempting to persuade a competitor from competing and dividing the market, unlawfully requiring its personal computer manufacturers to agree to license and install its browser as a condition of obtaining licenses for the Windows 95 operating system, intending to tie unlawfully its internet browser software to its new Windows 98 operating system, misusing its Windows operating system monopoly by placing restrictions on the personal computer manufacturers' ability to acquire licenses to the Windows operating system, entering into anticompetitive agreements with virtually all of the nation's largest On-Line Service Providers and Internet Service Providers, and entering into anticompetitive agreements with Internet Content Providers." See 1998 WL 249358 (Department of Justice News Release). What this essentially means is that Microsoft was charged with having a monopoly on the personal computer software market.

In his opinion in Microsoft, Judge Jackson essentially found Microsoft guilty of violating §§ 1 and 2 of the Sherman Act and in creating a monopoly for itself in the personal computer software market. After issuing its findings of fact and law, the court found that the proper remedy for Microsoft was "conduct modification and structural reorganization including mandated divestiture." See Microsoft, supra. The court found that a structural remedy was imperative because Microsoft had created a monopoly for itself and was unwilling to remedy the situation. This decision has been appealed and is presently in the United States Supreme Court.
Microsoft Corporation charging Microsoft with "engaging in anticompetitive and exclusionary practices designed to maintain its monopoly in personal computer operating systems and to extend that monopoly to internet browsing." In the Department of Justice News Release announcing the filing of the antitrust suit, then Attorney General Janet Reno was quoted saying “[w]e (the Department of Justice) is acting to preserve competition and promote innovation in the computer and software industry." Joel I. Klein, then Assistant Attorney General in charge of the Department's Antitrust Division, furtherey by stating that the action “will protect innovation by ensuring that anyone who develops a software program will have a fair opportunity to compete in the marketplace.”

What does the Microsoft litigation have to do with non-profit hospital merger cases? Absolutely nothing, which is why a discussion of this litigation was included in this article. The Microsoft case is the typical example of what we think of when we think of antitrust law — a big business gaining a monopoly on the market, raising prices and excluding any other possible competition. You cannot start a computer without seeing the Windows icon. Almost every computer available to buy has Windows already on it. No other company can gain ground on the market because Microsoft has control of the market. Microsoft can raise its prices and charge whatever prices it wants because it has a complete monopoly on the market.

31 1998 WL 249358 (Department of Justice, Antitrust Division, News Release).
32 Id.
33 Id.
DISCUSSION

I. THE HEALTH CARE INDUSTRY

The health care industry is completely different from any other industry. One does not think of the antitrust laws applying to hospitals in the same way as the antitrust laws apply to Microsoft or other corporations. Health care is an essential in life; one cannot survive without it. The majority of hospitals in the United States are non-profit hospitals, they are not out to make a huge profit for their shareholders, they are out to create quality care for their communities. Should the antitrust laws apply to these non-profit hospitals in the same way that they apply to corporations in the business market?

As stated by the Health Care Task Force of the United States Department of Justice “[t]his is a time of great change and restructuring in the health care industry.”34 Further, “[a]s markets are re-defined and payers and providers adapt to competitive pressures and consumer concerns, antitrust enforcement and guidance play a critical role.”35 According to the Department of Justice Health Care Task Force, since 1996 the Division has completed two hospital merger cases, one criminal price fixing case, and numerous civil non-merger health care cases.36 The Division has also issued guidelines for the health care industry and numerous review letters to various participants in the health care industry.37

One of the most prominent cases affecting the health care industry was Goldfarb v.

34http://www.usdoj.gov/atr/public/health_care/2044.htm
35Id.
36See id.
37See id.
This case essentially found that the "learned professions" (the health care profession) were not exempt from the antitrust laws. Cases such as Goldfarb helped to remove the private restraints of trade that had inhibited competition.

There is quite a bit of controversy concerning whether the antitrust laws should be attributable to the health care industry. Some providers argue that the complex and uncertain nature of antitrust law will "thwart efforts by providers to efficiently reorganize their business affairs through mergers and joint ventures." This view is disputed by those who contend that competitive market forces are "critical to any public policy relying on competitive markets."

But how do the antitrust laws really affect the health care industry? What do people in the industry think? Some argue that although antitrust law was once seen as the engine of competitive reform, it has now "come to be regarded in some quarters as a roadblock, hindering providers and insurers otherwise poised to reorganize themselves to deal with the new

38 421 U.S. 773 (1975)


41 See id. (citing Frederic J. Entin, et al., Hospital Collaboration: The Need For An Appropriate Antitrust Policy, 29 Wake Forest L. Rev. 107 (1994)).

competitive order."43 Others argue that hospitals and policy makers should reexamine the antitrust laws and search for mechanisms to "ensure that the antitrust laws encourage hospitals and other health care institutions to provide the highest quality services at the lowest possible cost."44

Issues concerning the Department of Justice regarding the health care industry in recent years have ranged from multiprovider networks, to restrictive dealing arrangements, to hospital mergers, to physician collaborations.45 All of these issues play a huge role in the health care market and have a huge impact on the public.

A. Applying Antitrust to Hospital Mergers

One of the hottest and most written about issues in the health care industry in recent years is hospital mergers. As noted in a recent article in the Antitrust Law Journal, over the past several years, both state and federal antitrust agencies have actively investigated and challenged hospital mergers across the United States—the Department of Justice has challenged hospital mergers in Dubuque, Iowa; Clearwater, Florida; and Long Island, New York, and the Federal Trade Commission has challenged hospital mergers in Poplar Bluff, Missouri; Grand Rapids, Michigan; and Joplin Missouri.46 The most controversial issue surrounding these hospital merger


44See id (citingFredric J. Entin, Hospital Collaboration: The need for an Appropriate Antitrust Policy, 29 WAKE FOREST L. R. 107, 110 (1994)).


cases is whether and how to apply the antitrust laws to these cases, particularly, the question is whether to apply the antitrust laws to hospital mergers involving two non-profit hospitals.

Hospitals as we know them have really only been around since the early twentieth century. It has only been recently that hospitals have become what some may consider “money-makers”. These “money-makers” are the for-profit hospitals.

Although most of health care mergers are allowed to proceed, many undergo considerable scrutiny before receiving approval.\(^\text{47}\) The FTC and the Antitrust Division have challenged sixteen proposed hospital mergers in the last fifteen years and have negotiated consent orders in a number of others.\(^\text{48}\) There are Guidelines that are published by the FTC and the DOJ by which the agencies evaluate certain mergers to determine the anti-competitive effects of the proposed merger.\(^\text{49}\) But it must be noted that even these Guidelines do not take into the non-profit status of

\(^{47}\text{See Monica Noether, Overview: Economic Issues in Hospital Merger Policy, 13 SPG Antitrust 6 (1999).}\)

\(^{48}\text{Id.}\)

\(^{49}\text{See Merger Guidelines (Overview).}\)

First the agency must assess whether the merger would significantly increase concentration and result in a concentrated market. Second, the agency assesses whether the merger raises concern about potential adverse competitive effects. Third, the agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally, the agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the
the hospitals.

Thus far, the courts have been consistent in determining what is the requisite showing for a §7 Clayton Act claim. To succeed on a §7 claim, the government must show a "reasonable probability that the proposed transaction would substantially lessen competition."\textsuperscript{50} According to the courts, the current understanding of §7 is that it forbids mergers that are likely to "hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competition level."\textsuperscript{51}

When analyzing non-profit hospital mergers, the courts first determine what are the relevant markets. The relevant market is defined by "identifying competitors who could provide defendants' customers with alternative sources for defendants' services in the event defendants, as the merged entity, attempted to exercise market power by raising prices above competition level."\textsuperscript{52} Two markets must be established: a geographic market and the relevant product market. A geographic market is that geographic area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition."\textsuperscript{53} After establishing the relevant markets, the court must determine whether the plaintiff has made a prima facie case of lessened competition and whether the defendant hospitals have successfully

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\textit{id.}
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\textsuperscript{51}See Butterworth, 946 F. Supp. at 1289.

\textsuperscript{52}See id. at 1290.

\textsuperscript{53}Id.
rebut that prima facie case.

1. The Butterworth Case

In May 1995, the governing boards of two non-profit hospitals in Kent County, Michigan, Butterworth Hospital and Blodgett Memorial Medical Center voted to merge the two organizations. A Commission was organized to analyze the merger and recommended against the merger and recommended that Blodgett reorganize its then present facilities. The two health facilities decided against reorganization and instead decided to go ahead with the proposed merger. The FTC objected to the proposed merger and moved for a preliminary injunction. In this case, the District Court Judge McKeague found that the FTC had made out a prima facie case, but further found that the defendants had rebutted that prima facie case by showing that under the facts of this particular case, statistical evidence showed that the proposed merger was not likely to result in anticompetitive effects.

The first task before the court was to determine the relevant markets. The court determined that the relevant product market was two-fold: general acute care inpatient hospital services, and primary care inpatient hospital services. Next, the court had to determine the relevant geographic market. The court found that defining the relevant geographic market is highly fact-driven, but in this particular case the relevant geographic market was the Greater Kent

\[54\text{See } \textit{Butterworth}, 946 \text{ F. Supp. at 1288.}\]

\[55\text{See } \textit{id.} \text{ at 1289.}\]

\[56\text{See } \textit{id.}\]

\[57\text{See } \textit{id.} \text{ at 1302.}\]

\[58\text{See } \textit{id.} \text{ at 1290.}\]
After defining the relevant markets, the court had to determine whether the FTC made a prima facie showing that the merger would have anticompetitive effects. To make out its prima facie case, the FTC used expert economic testimony. Without going into the specifics of the expert testimony, the expert ultimately testified that the proposed merger would result in control of between 65% and 70% of the market, thus, both of the relevant markets would be highly concentrated. Based on this expert testimony, the court concluded that the FTC had made out its prima facie case that the proposed merger would violate §7 of the Clayton Act.

The defendant hospitals next had the burden of refuting that prima facie case. The defendants cited to a well-known economist William J. Lynk. Mr. Lynk authored an article in which he looked at certain data and determined that higher hospital concentration is associated with lower non-profit hospital prices. From this evidence, the court found that experts were in agreement that high market concentration among nonprofit hospitals does not correlate positively with higher prices. In addition to this economic evidence, the defendants also argued that the hospitals' non-profit status should play a key role in the decision.

The court ultimately found that the non-profit status of the hospitals was not dispositive,

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59 See id.

60 See id. at 1294.

61 See id. at 1295-96.

62 See id.

63 See id.
but it was material. The court concluded that the involvement of prominent community members and business leaders on the boards of the hospitals could be expected to bring accountability to the price structuring. The court also found that the merger would result in great efficiencies. The whole impetus behind the merger was to avoid substantial capital expenditures which both hospitals would have otherwise been required to make. Without the merger, both hospitals would have been required to spend substantial sums enlarging their existing facilities. Because of all of the evidence presented, the court found that the merger could proceed.

1. Before Butterworth

Prior to Butterworth the courts were inconsistent in determining whether and how to apply the antitrust laws to non-profit hospital mergers. In United States v. Carilion Health Sys. The merger between two non-profit Virginia hospitals was found not to violate the Sherman

54 See id. at 1297.
55 See id. at 1302.
56 See id.
57 See id. at 1301.
58 See id.
59 The analysis used by the court in this case appears to directly follow an agency analysis of a merger under the Merger Guidelines. The court found that the merger would likely result in a concentrated market, which may have the potential for anticompetitive effects. However, entry into the market was timely and sufficient, and the merger would result in great efficiencies that might not be achieved without the merger.

Act. In *United States v. Rockford Memorial Corp.* the court found that the merger of two Rockford, Illinois, non-profit hospitals violated §7 of the Clayton Act. In *Federal Trade Commission v. University Health, Inc.* the court found that a merger of two non-profit hospitals in Georgia violated §7 of the Clayton Act. In all three of these cases, the courts found that the fact that these hospitals were non-profit did not automatically make the mergers legal. However, the courts did not give much guidance on how to analyze the proposed merger.

1. **Cases After Butterworth**

   One of the most recent cases addressing the implications of the antitrust laws on a proposed merger between two non-profit hospitals is *State of California v. Sutter Health Sys.* In this case, the state brought action to enjoin the proposed merger of the two hospitals arguing that the proposed merger would have anticompetitive effects violating the Clayton Act. One of the main purposes of the merger was the deteriorating financial conditions of the hospitals. The court looked at various elements of the merger including the relevant markets, the services

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72 898 F.2d 1278 (7th Cir. 1990).
73 *Rockford*, 898 F.2d at 1280.
74 938 F.2d 1206 (11th Cir. 1991).
76 130 F. Supp.2d 1109 (N.D. Cal. 2001).
77 See id.
78 See id.
provided, economic conditions, and the various alternative available. As stated, the court ultimately found that the State had not met its burden of proving a prima facie case of anti-competitive effects. The court ended its opinion citing “[a] court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market force, bringing about the very ills the antitrust laws were meant to prevent . . . This appears to have even more force in an industry, such as healthcare, experiencing significant and profound changes.” Does this just mean that the courts should be very careful in their decisions regarding these kinds of merger and should try to stay out of the decision-making if at all possible, or does it mean that because the industry is changing so profoundly, maybe the antitrust laws as we know them should not apply at all?

B. The “Non-Profit Defense”

The “non-profit defense” has evolved from the theoretical assertion that nonprofit status in and of itself “erases any threat of post-merger anticompetitive effects to a group of related arguments purporting to show factually that nonprofit hospitals operate competitively regardless of market concentration.” There are essentially five principle arguments that have been summarized:

1. “Non-profit hospitals are not profit maximizers.”-- The mission of non-profit hospitals

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79 See id.

80 Id. at 1137.


82 See id.
is not to maximize profits, but to provide quality care at prices that are affordable to the local community.\textsuperscript{83}

2. “Governing boards are benevolent.” -- The governing boards of non-profit hospitals are comprised of local employers, clergy, and community leaders who have no interest in maximizing prices but to keep health care prices low for their community members.\textsuperscript{84}

3. “Community Commitments’ will protect consumers.” -- The philosophy behind the non-profit hospital is community ownership and giving back to the community.\textsuperscript{85}

4. “Price-concentration data refute traditional assumptions.” -- Data has shown that relatively high concentration among nonprofit hospitals in a market corresponds to relatively low prices and that no positive correlation exists between high hospital share for a particular service and that hospital’s price for that service.\textsuperscript{86}

5. “Efficiencies will directly benefit consumers.” -- Substantial efficiencies that are achieved from non-profit hospital mergers pass directly to consumers in the form of lower prices or improved quality care because the non-profit hospitals are not responsible to stockholders demanding greater returns.\textsuperscript{87}

Non-profit hospitals do not act in the same manner as for-profit hospitals. One writer

\textsuperscript{83}See id.
\textsuperscript{84}See id.
\textsuperscript{85}See id.
\textsuperscript{86}See id.
\textsuperscript{87}See id.
compared the private non-profit hospital to a consumer cooperative.\textsuperscript{88} These writers stated that it is very unlikely that a cooperative will arbitrarily raise prices just to earn higher profits simply for the fact that the owners of the coop are also the consumers.\textsuperscript{89} In the same sense, if the non-profit hospital is controlled by the same people who are dependant upon it for health services, there is no incentive for it to raise its prices.\textsuperscript{90} As many commentators have noted, the individuals who manage these non-profit hospitals "lack the incentive to exercise market power because they do not stand to personally gain from price increases."\textsuperscript{91} In addition, the corporate charter and the tax-exempt status of non-profit hospitals prohibit them from being operated for the financial gain of only a few.\textsuperscript{92}

In addition further argument notes, as many courts and academics point out, that the economic evidence regarding non-profit hospital mergers is very sketchy and unreliable. Many academics rely on the economic evidence of Dr. Lynk from \textit{Butterworth}. As you may recall, Dr. Lynk found no positive correlation between the increased concentrated market and increased prices.\textsuperscript{93} The courts in these various cases have noted that economic evidence is not very reliable, and that it varies from case to case and market to market.


\textsuperscript{89}See \textit{id.} at 270-72.

\textsuperscript{90}See \textit{id.}


\textsuperscript{92}See \textit{id.}

\textsuperscript{93}See \textit{Butterworth}, supra.
Finally, there is the efficiencies argument. Many courts refuse to look at the efficiencies argument as the tell-all as to showing that the proposed merger should be allowed, however most courts always address the issue. The efficiencies argument is basically this: When two non-profit hospitals propose a merger, it is because at least one or both is intending to put out a great deal of money to expand the present facilities and resources. Merging the two hospitals would increase and better the facilities and the resources themselves. This produces greater efficiencies. If the hospitals did not merge, each would have to spend a great deal of the community’s money in expanding their existing facilities, they may even have to increase their prices in order to do so. By merging, it would essentially cost the community less money and the community would gain better health care.

C. Arguments Against the “Non-Profit Defense”

Those that argue for applying the antitrust laws to non-profit hospital mergers argue that non-profit hospitals may still exercise market power even if their primary objective is not to maximize manager’s profits. 94 These commentators argue that the non-profit hospitals may use surplus to achieve those objectives that their managers do value, such as higher levels of quality than are demanded. 95 In addition, non-profit hospital managers may use the additional revenue to provide themselves with “higher salaries and perquisites that fall outside the prohibition on personal gain for non-profit hospital managers.” 96

95 See id.
96 See id.
In a recent article written regarding antitrust analysis of non-profit hospital mergers, the community control and pricing patterns of three types of non-profit hospitals was analyzed: the independent hospital, the members of a local hospital system, and the member of a non-local hospital system.\(^{97}\) This study looked at the all important policy consideration of whether certain pricing behaviors are more attributable to some non-profit hospitals than others.\(^{98}\) As noted, "[n]onprofit hospitals are a highly diverse group of organizations that differ along many attributes that may be relevant to whether and to what degree they are likely to exercise market power in the form of higher prices."\(^{99}\)

The results of this study indicated that when conditions existed to create a more concentrated market, all three types of nonprofit hospitals exercised their market power by increasing prices, and the hospitals that were members of the nonlocal systems were more aggressive in exercising market power that were either the independent or local system hospitals.\(^{100}\) Although this study found that higher prices resulted in all three contexts of non-profit hospital mergers, higher prices were more significant when the hospitals merged with hospital systems or nonlocal systems.

\(^{97}\)See Gary J. Young, Kamal R. Desai & Fred Hellinger, Community Control and Pricing Patterns of NonProfit Hospitals: An Antitrust Analysis, 25 J. Health Pol. Pol'y & L. 1051 (2000). This study was set in California, mainly because it is most recognized for promoting price competition among hospitals and because it has one of the most extensive managed care industries in the country. See id. Thus, the authors make known that the same results will not be found in all states, and in fact, many states will have exactly the opposite results. See id.

\(^{98}\)See id.

\(^{99}\)Id. at 1053-54.

\(^{100}\)See id. at 1051.
D. A Final Argument

There is one final argument that has been made against the application of the antitrust laws in the case of non-profit hospital mergers. Under this argument, because non-profit hospitals by their very nature are non-profit and do not issue stock like a corporation, the Clayton Act does not apply at all. This argument has somewhat diminished over time, and many courts when faced with questions of antitrust violations in non-profit hospital mergers bypass this argument of jurisdiction and just assume that jurisdiction is proper. However, this question has yet to reach the United States Supreme Court and thus remains viable and deserves a bit of discussion.¹⁰¹

CONCLUSIONS FROM THE EVIDENCE

The fact that the courts continuously go either way on the issue of exactly how to apply the antitrust laws to these non-profit hospital mergers is evidence that this is a troubling issue. However, after looking at all of the evidence that has been presented by the courts and academics on this issue, it is clear that the majority of these mergers would not violate the antitrust laws as they are applied anyway. The standard set forth in Butterworth is exactly on point and other courts should follow. It seems futile to apply the antitrust laws to these mergers when the evidence behind the mergers shows that the intent is non-competitive.

The most important elements that the courts must look at are the nature of the non-profit hospital form, the fact that the governing boards are neutral, and the efficiencies that are realized.

¹⁰¹For a complete discussion of the background of the Clayton Act and how jurisdiction may apply in these non-profit hospital merger cases, see Laura L. Stephens, NonProfit Hospital Mergers and Section 7 of the Clayton Act: Closing an Antitrust Loophole, 75 B.U. L. Rev. 477 (1995).
These hospitals are not profit-making, and what profit they do make, essentially goes back to the communities in which they are located. If a non-profit hospital is struggling and not able to service its community properly, shouldn't we encourage a merger between that hospital and another non-profit hospital? The goal is not to raise prices to benefit the board of the hospital, the goal is to better provide for the community. Even if prices were raised nominally, which there is no concrete evidence that they would, wouldn't it be worth it in order to provide better health care to the community?

This is not to say that there are no antitrust issues involved in all hospital industry mergers. It is pretty clear that when you have for-profit businesses or for-profit hospitals taking over other businesses, antitrust issues may arise. Therefore, it would be futile to try to argue that the antitrust laws should not apply to the health care industry or health care institutions at all. In addition, because of the persistent arguments for applying the antitrust laws to hospital mergers, particularly non-profit hospital mergers, it may seem (to some) pretty futile to argue that the laws should not apply at to these mergers. It is true that statistically the majority of these hospital mergers are allowed to proceed without problem. It is also true that much of the analysis of these mergers turns on the economic expert evidence. Will the merger have anticompetitive effects? There are hundreds of studies that the government can point to and that the defendant hospitals can point to and all of them have differing results. And when looking at these different studies, the courts all come to differing conclusions as to whether the mergers violate the antitrust laws.¹⁰²

But beyond the economic evidence involved in these cases, the most important issue to

¹⁰²It is beyond the scope of this paper to analyze all of the different economic evidence regarding these hospital mergers. It is enough to say that there seems to be no (nor can there be) any consensus as to whether these mergers are always anticompetitive.
look at is how the courts have been in such disagreement as to how much reliance should be put on the non-profit status of the hospitals. Neither the antitrust laws nor the Merger Guidelines make the non-profit status of the hospital a determining factor. But the non-profit status of the hospital is the most compelling factor. The “non-profit defense” should be given the most critical weight and credit. If this defense was given the weight that it should when looking at these non-profit hospital mergers, it would be clear that these mergers do not violate the antitrust laws and thus should be exempt. These non-profit hospital mergers are highly distinguishable from cases such as Microsoft, and the most distinguishing factor is the non-profit status of the hospitals.

One thing that is clear is that because the health care industry is at such a high growth stage, more and more antitrust issues will be arising. Although I believe that the non-profit status of the hospitals should make these mergers exempt from the antitrust laws, as they have been applied through history, it is quite clear that the courts are very hesitant to exempt these mergers, and probably will not any time in the near future. Perhaps it should be up to the Legislature to create new laws to accommodate for these types of mergers. Or perhaps it should be up to the Legislature to amend the already existing laws.