CHAPTER 6. GETTING TO THE FINISH LINE: AVOIDING GUN-JUMPING AND OTHER FALSE STARTS IN PRECLOSING ANTITRUST COMPLIANCE

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I. Introduction

Much has been said and written of the impetus created by the Affordable Care Act (and more generally, the ideas collected under the label of "health reform") for realignment and structural change in health care services markets. It is a current tenet of health care management and policy that greater provider consolidation is an inevitable consequence of the ongoing shifts in market economics. And while mergers and other large-scale corporate consolidations often take center stage, for every merger under consideration, there are dozens of more limited business relationships being discussed, the sizes and shapes of which can differ widely.

Regardless of the form taken, all interenterprise business planning tends to share common objectives and attributes:

- A need to understand the economics at stake.
- A need to conduct due diligence of one's business partner.
- A need (or desire) to ensure that decisions outside the scope of the collaboration are not injurious to the collaboration.
- Frequently, the involvement of consultants and investment bankers in the partner selection and transaction planning processes.
- The creation of documents—and more documents.

Antitrust compliance issues and strategies reside as certainly in these areas as in the substantive merits of a merger or acquisition. True, preclosing conduct issues are not as sexy as other antitrust topics, but the failure to acknowledge them can have significant consequences. Preclosing behavior can influence the course of an antitrust investigation (or ensuing litigation) and itself can become the focus of an enforcement action. In the past two decades,

the Federal Trade Commission (FTC) and Department of Justice (DOJ) have brought a number of antitrust enforcement actions challenging preclosing conduct by firms pursuing mergers, acquisitions, and joint ventures. These actions have focused not only on so-called "gun-jumping" (premature or over-reaching involvement by one party in the affairs of another) but also on exchanges of confidential information among parties to the proposed transaction. Moreover, in making enforcement decisions, the FTC and DOJ are increasingly reliant on party documents (both those created in the preclosing course of transaction planning and in the ordinary course of business) and frequently use poorly conceived or inconsistent documents against the parties who created them.

Thus, notwithstanding that the parties to a transaction typically want to see results "yesterday," management of preclosing conduct issues can avoid unnecessary delays and better position a transaction to withstand an investigation.

This chapter discusses three of the major topics that antitrust counsel must address with parties to any strategic combination or partnership: (1) gun-jumping; (2) exchanges of competitively sensitive information; and (3) management of documents and information. We conclude each discussion with some practical observations about preclosing conduct in strategic transactions.

II. Preclosing Coordination and Gun-Jumping

The extent of antitrust law limitations on the ability of parties to coordinate their preclosing conduct depends on two entirely separate questions. First, are the parties competitors, such that their coordinated activities may constitute an unlawful agreement under Section 1 of the Sherman Act? In this regard, it is important to be mindful that competition has many dimensions. Two organizations that do not compete with each other in the provision of, e.g., basic hospital or health care services, may nonetheless be competitors for tertiary referrals. They also may be competitors as purchasers of labor or other inputs, e.g., in recruiting physicians, nurses, and technologists.

Second, irrespective of the status of the parties as competitors, is the transaction subject to federal premerger notification requirements under the Hart-Scott-Rodino (HSR) Act?

As we discuss below, the HSR Act imposes an entirely distinct set of limitations on preclosing conduct.

The DOJ and the FTC have consistently cautioned that parties to mergers, joint ventures, and other strategic transactions who prematurely transfer beneficial ownership or engage in some types of preconsummation conduct coordination, may be liable for violating the HSR Act, of Section 1 of the Sherman Act, or of Section 5 of the Federal Trade Commission Act.[1] In light of the antitrust agencies' longstanding and continuing interest in health care transactions, it is important for health care firms engaged in these transactions to maintain their status as independent actors until the transaction has been consummated.[2]

A. Preclosing Coordination by Competitors

Federal antitrust enforcement policy is clear that "the pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently."[3] This statement applies to business combinations short of merger as well. Where the parties to a merger, joint venture, or other business combination are competitors, preclosing coordination may violate section 1 of the Sherman Act or section 5 of the FTC Act.[4] Such violations may arise at any time prior to the consummation of the transaction, even if the applicable HSR waiting period has expired, or alternatively, even if the transaction is not reportable under the HSR Act.[5] This tenet remains true even when a transaction reaches a point where closing appears to be inevitable and all necessary regulatory approvals are assured.

Section 1 of the Sherman Act prohibits agreements or arrangements that restrain trade among competitors.[6] Until a transaction has closed, the parties are required to compete as separate economic entities without regard to any changes in their competitive status that will result from the transaction.[7] The principal standard for assessing whether an agreement unreasonably restrains competition is the rule of reason, which requires an analysis of the agreement's effect on competition in the relevant market.[8] However, until consummation, horizontal price-fixing agreements, agreements to limit output, bid-rigging, and market-allocation agreements among competitors or potential competitors are considered per se illegal—that is, without regard to whether

any adverse effects on competition result (or may result) from the agreement.[9]

Accordingly, prior to closing, agreements between the parties concerning their current (preclosing) business decisions (for example, prices that either will charge, or decisions to change services or to deal with health plans or other customers) may be prosecuted as violations of the antitrust laws, the same as would be the case in the absence of a pending transaction. In the same vein and as we discuss in more detail below, exchanges of competitively sensitive information (that could lead to coordination of preclosing business decisions) will pose potential antitrust concerns.

B. Transactions Subject to HSR Notification Requirements

The HSR Act is a "report and wait" statute. It establishes a premerger notification procedure that requires parties to notify the antitrust agencies of certain proposed transactions, and observe a waiting period before consummating the transaction.[10] Whether a particular transaction is reportable under the HSR Act, and therefore subject to the statutory waiting period, depends upon the value of the acquisition and, in certain transactions, the size of the parties as measured by their sales and assets. In general, transactions valued at more than $303.4 million are reportable without regard to the size of the parties. Transactions valued at more than $75.9 million generally must be reported if one party has assets or sales valued at more than $151.7 million and the other party has assets or sales of at least $15.2 million.[11]

The statutorily imposed waiting period (30 days, unless extended) functions to keep parties operating as separate economic entities while the FTC and DOJ investigate the proposed transaction.[12] Transfer of beneficial ownership before the expiration of the applicable waiting period may be challenged as a violation of the HSR Act, regardless of the competitive posture of the firms.[13] Parties that "jump the gun" are subject to statutory penalties of up to $16,000 per day (and those fines may be imposed on both the company and any of its officers or directors deemed to be culpable).[14]

To be clear, for HSR purposes, gun-jumping is more than formally closing the transaction prior to the end of the waiting period. As discussed below, penalties also have been as-

sessed in cases where the parties have too-closely coordinated their decision making prior to closing such that one party could be said to have gained de facto control over material decisions by, or the operations of, the other party.

C. Gun-Jumping and the Transfer of "Beneficial Ownership"

Whether conduct amounts to gun-jumping in violation of the HSR Act turns on whether there has been a transfer "beneficial ownership" prior to the expiration of the waiting period. "Beneficial ownership" is not defined by the Act; however, the Statement of Basis and Purpose accompanying the issuance of the HSR rules provides some guidance:[15]

> the existence of beneficial ownership is determined in the context of particular cases with reference to the person or persons that enjoy the indicia of ownership, which include the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock [and] the investment discretion (including the power to dispose of the stock).

A number of enforcement actions brought under the HSR Act have been framed in terms of these four indicia of beneficial ownership.[16] However, more recent actions have focused on the transfer of elements of operational control, particularly where the acquiring firm has taken steps to integrate personnel and operations,[17] or exercise control over the target firm's customer contracts.[18] The latter category is a recurring red flag in health care transactions.

Beneficial ownership analysis can be particularly complex where merger agreements include "standstill" provisions designed to prevent the acquired firm from acting in a way that would undermine the value of the deal.[19] The DOJ has confirmed that provisions that are reasonable and necessary to protect the buyer's legitimate interest in maintaining the value of the to-be-acquired business are acceptable, so long as they do not impair the acquired firm's independence.[20] For example, the agencies typically will not challenge customary provisions restricting the acquired (target) firm's right to declare dividends, encumber assets or stock, acquire other businesses, amend organizational documents, make large capital expenditures or discharge claims outside of the ordinary course of business.[21] By contrast, agreements that "impose

extraordinary conduct of business limitations" enabling the buyer to exercise operational control will violate the HSR Act.[22] As a general rule, restrictions on personnel decisions, customer contracts and customer pricing raise such concerns and should be avoided.[23]

D. Guidance for Preclosing Conduct

The preclosing activities of parties to a merger or other business combination should be guided by the fundamental principle that the parties must continue to operate as separate entities until the transaction is consummated. All decisions concerning the preclosing conduct of either party must be made independently by that party. There should be no coordination of any preclosing business decisions except upon the close advice of counsel.

In particular, there should be no preclosing participation (whether formal or informal) by the management of one party in the management committees or C-Suite activities of the other party. Areas of particular sensitivity (that is, where coordination of business decisions would present particular antitrust risk) for health care organizations would include:

- Any type of pricing decisions.
- Plans to negotiate (or not to negotiate) with any health plan.
- Decisions to add or expand, or to discontinue or contract, services.
- Decisions to expand into or withdraw from specific geographic areas.
- Strategic planning (particularly as to strategies that would be pursued in the absence of the pending merger or transaction).
- Physician and professional recruitment and alignment plans.
- Physician contracting.
- Employee compensation and benefit strategies.

III. Preclosing Information Exchanges

The exchange of information among parties to a proposed health care transaction is both necessary and inevitable. It is critical to the valuation, negotiation, planning, and execution of any transaction, whether a merger, acquisition, strategic affiliation, or joint venture.

Information exchanges generally arise in three separate, but related, contexts during the lifespan of a transaction. First, prior to (and sometimes beyond) any definitive agreement being reached, parties engage in due diligence, during which a buyer evaluates a seller's business for purposes of valuation and determining a purchase price, warranties, indemnities, and other terms of agreement. Depending on the transaction, due diligence can be extensive and involve the exchange of substantial amounts of confidential and competitively sensitive information. Second, after a definitive agreement is executed but prior to any closing, parties may wish to engage in joint planning activities to prepare for postclosing operations and integration. Integration planning of this sort similarly involves the exchange of operational and other types of sensitive information among the parties.

Finally, there are instances in which parties desire to document the expected benefits of a health care transaction and thus engage an outside expert to conduct a formal efficiencies analysis of the proposed arrangement. These analyses in turn can be used in obtaining approval of the transaction from antitrust and other regulatory officials. Because these studies seek to demonstrate the operational and clinical efficiencies that the parties will be able to achieve as a result of the proposed transaction, they necessarily involve the exchange of sensitive information that the efficiencies expert will evaluate and rely on in preparing the efficiency analysis on behalf of the parties.

While information exchanges are commonplace in virtually all transactions, parties exchanging information during any one of these stages of a transaction must be mindful of the attendant antitrust risks, which may arise when competitively sensitive information is exchanged between competitors without a legitimate business purpose or justification, in an overly broad manner, and/or with the intent to collude or cause anticompetitive effects. To limit these antitrust risks, important safeguards, explained below, should be considered and vetted with antitrust counsel in advance of any preclosing information exchanges.

A. The Legal Framework

1. Information Exchanges and Antitrust Law Generally

The Sherman Act does not condemn exchanges of information between competitors in the abstract.[24] Agreements among competitors to exchange competitively sensitive information, such as prices, can further legitimate business purposes in a proper case. The Supreme Court has recognized that the exchange of "price data and other information among competitors does not invariably have anticompetitive effects"; rather, information exchanges "can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[25] Thus, so long as the exchange is unlikely to have anticompetitive effects or is done pursuant to a legitimate business justification, the exchanges are evaluated under the rule of reason.

In a rule of reason context, courts will examine the structure and concentration of the relevant market or industry and the type of information exchanged in determining whether an exchange is anticompetitive.[26] Anticompetitive effects are more likely if the market is concentrated with few competitors, particularly if barriers to entry are high; if current or future information, as opposed to historical information, is exchanged; and if the information is transaction-specific and not aggregated.[27] To the extent price or other sensitive information is publicly available or available from another source, there is less likelihood of anticompetitive effects.[28]

It bears noting that high levels of concentration in many hospital and health services markets raise particularized concern that information exchanges among competitors may promote opportunities for unlawful collusion. This concern was recently voiced in the FTC's challenge to the merger between OSF Healthcare System and Rockford Health System. In arguing that a history of "back channel" information sharing among the three hospitals in Rockford, Illinois, predicted continued collusion and diminished competition following the proposed merger, the Commission observed:

> Coordination does not require back room meetings; it can occur by sharing confidential information, boycotting disfavored terms, or delaying new amenities or services to temper the

> "arms race" known as competition. By reducing the number of competitors, the Acquisition would only increase OSF's and [the third market participant] SwedishAmerican's ability and incentive to coordinate.[29]

The type of information exchanged also is relevant to the antitrust inquiry. Because of the direct potential to facilitate illegal price fixing, the antitrust laws are most concerned with the exchange of prices and pricing-related information among competitors. The Supreme Court has held, for example, that a manufacturer's continuous exchange of recent sales prices was unlawful because it had the effect of stabilizing prices and chilling competition in what was a concentrated market.[30] In contrast, the Court has upheld exchanges among competitors of past prices and other data, without any identifying customer information, where there was no purpose to fix prices.[31]

Based on these precedents, the generally accepted advice to competitors seeking to exchange competitively sensitive information is that these exchanges are permissible only if the information is related to past transactions, generally more than three months old (and no longer current); the data are furnished to an independent third party to be complied and aggregated; and the data reported to the parties are sufficiently aggregated (or redacted) such that individual customer or purchaser information is not identified or shared.[32]

In addition to price and cost information in connection with sales, these principles apply equally to sensitive information exchanged among competitors concerning the prices or costs at which they purchase important inputs, such as labor and equipment. Antitrust concerns arise, for example, when competing firms exchange information about the wages or salaries they pay or will pay for employees, particularly where the two parties compete in relatively concentrated or specialized markets, as health care providers often do.[33]

2. Preclosing Considerations

In the confined space of a specific transaction, conducting information exchanges in compliance with the antitrust laws can be even more challenging. Of course, to the extent parties to a proposed transaction are not competitors in any relevant antitrust market, anticompetitive harm is unlikely

from the exchange of information. But if the parties are competitors, the exchange of competitively sensitive information prior to closing can pose significant compliance issues.

The antitrust enforcement agencies, for example, view overly broad exchanges of documents and information between competing business personnel during the course of a transaction as evidence of anticompetitive purpose or intent. While antitrust enforcement officials recognize the procompetitive benefits of exchanging information,[34] they have expressed concern that information exchanges can be anticompetitive in specific circumstances. These include, for example, parties using sensitive information during negotiations to coordinate their activities in an anticompetitive manner, such as raising prices; engaging in "sham" negotiations to exchange sensitive information that is used to collude; and one party using information exchanged in the course of a negotiation to undermine a competitor or potential competitor with no intention of consummating the transaction.[35]

As discussed above, absent anticompetitive effects, exchanges of sensitive price and other information is not illegal provided there are legitimate business justifications for doing so. In the transaction context, there are three legitimate business justifications that parties can rely on in support of their need to exchange sensitive information: (1) due diligence, i.e., the need to value the business being sold and arrive at a purchase price; (2) integration planning, i.e., the parties' need, postsigning but preclosing, to plan for the efficient integration of the two businesses; and (3) efficiency analysis, i.e., evaluating and demonstrating the operational and clinical efficiencies that could be achieved from a proposed transaction.

B. Transactional Due Diligence

1. Agency Enforcement Actions

The DOJ and FTC have brought enforcement actions under the HSR Act and the FTC Act accusing merging parties of unlawfully exchanging competitively sensitive information during the course of negotiating a proposed transaction. While none of these actions involved a stand-

alone violation of the Sherman Act, they are instructive as to the circumstances under which the antitrust authorities believe the exchanges of information among competitors to a transaction are anticompetitive.

In *In re Insilco Corp.*, the FTC alleged that the merging parties' exchange of information relating to pricing and customers prior to closing violated the FTC Act. The information exchanged included "descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-by-customer future pricing strategies."[36] The FTC asserted that in the absence of the transaction, the exchange would have been unlawful: Insilco had "requested and received . . . information that would likely have been detrimental to competition in the relevant markets if the Acquisition had not been consummated."[37]

The FTC's final order in *Insilco* provides an instructive list of the types of information that, if exchanged between competitors, raise antitrust concerns:

- "Non-Aggregated, Customer-Specific Information," [which] means information about a product's cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.
- "Strategies or Policies Related to Competition," [which] means information relating to a company's approach to negotiating with specific customers, targeting specific customers, identifying or in any other manner attempting to win specific customers, retaining specific customers, or risk of loss of specific customers, including, but not limited to, all sales personnel call reports, market studies, forecasts, and surveys which contain such information.
- "Analyses or Formulas Used to Determine Costs or Prices," [which] means a method, study, test, program, examination, tool, or other type of logical reasoning used to determine a product's cost and/or price for an identifiable individual customer.[38]

In *United States v. Computer Assocs. Int'l, Inc.*, as part of its claim that Computer Associates engaged in unlawful gun jumping in violation of the HSR Act, the DOJ asserted that Computer Associates obtained access to highly sensitive information relating to the competitive bidding of the target,

Platinum, during the course of due diligence.[39] This exchange, coupled with additional preclosing misconduct, led DOJ to conclude that Computer Associates unlawfully exercised beneficial control of Platinum prior to closing.

Similarly, in *United States v. Gemstar-TV Guide Int'l, Inc.*, the DOJ alleged that Gemstar and TV Guide "disclos[ed] substantial amounts of confidential information," in violation of the HSR Act. According to DOJ, the parties "shared confidential information on prices and IPG advertising capabilities, met jointly with consultants retained by TV Guide to develop pricing and marketing strategies, and discussed the optimum prices and capacity for their IPG advertising business";[40] and "shared information and acted jointly with respect to numerous business opportunities."[41] As in *Computer Associates*, the DOJ concluded that these exchanges, along with other preclosing misconduct, constituted an HSR Act violation.

Additionally, in *United States v. Input/Output, Inc.*, the DOJ alleged as part of its complaint that Input/Output prematurely exercised beneficial control in violation of the HSR Act because Input/Output was given access to the seller's "internal reports and email systems" as part of the parties' decision to integrate their operations prior to expiration of the HSR Act's waiting period.[42]

The DOJ and FTC prohibited the parties' disclosure of competitively-sensitive information in each of the enforcement actions discussed above. In doing so, the agencies also provided additional insight into what are permissible information exchanges. The final order in *Gemstar*, for example, indicates that it is lawful for merging parties to "conduc[t] or participat[e] in reasonable and customary due diligence" so long as:[43]

> (1) the information is reasonably related to a party's understanding of future earnings and prospects; and (2) the disclosure occurs pursuant to a non-disclosure agreement that (a) limits use of the information to conducting due diligence and (b) prohibits disclosure of any such information to any employee of the person receiving the information who is directly responsible for the marketing, pricing or sales of the Competing Product(s).

Similarly, the final order in *Computer Associates* provides that the parties are permitted to share information about

the target's bidding practices "only to the extent that bids are material to the understanding of the future earnings and prospects of the other party and only pursuant to a non-disclosure agreement." The order further provides that the nondisclosure agreement "must limit use of the information to conducting due diligence and must also prohibit disclosure of any such information to any employee of the party receiving the information who is directly involved in the marketing, pricing or sales of any product or service that is the subject of the pending bids."[44]

2. The *Omnicare* Decision

The Seventh Circuit's recent decision in *Omnicare, Inc. v. UnitedHealth Group, Inc.* reflects the same analytical concerns described above, but is of separate interest because of its conclusion that the parties' due diligence exchanges did *not* violate the Sherman Act.[45] Following the merger of UnitedHealth Group, Inc. ("United") and PacifiCare Health Systems, Inc. ("PacifiCare"), Omnicare brought suit alleging that premerger information sharing by United and Pacificare allowed the two insurers to fix prices in violation of the Sherman Act. Prior to the merger, Omnicare had negotiated separately with both insurers to enter into Medicare Part D pharmacy services agreements. Omnicare successfully negotiated a contract with UnitedHealth but could not reach an agreement with PacifiCare. After the insurers signed their merger agreement, Omnicare and PacifiCare signed an agreement that included terms more favorable to PacifiCare than the terms that UnitedHealth had accepted. Once the merger was consummated, the merged entity abandoned the agreement between UnitedHealth and Omnicare to take advantage of the more favorable PacifiCare agreement. Omnicare alleged that competitively sensitive information exchanged during the due diligence process allowed the insurers to coordinate their premerger negotiations with Omnicare, to Omnicare's detriment.

In support of its allegations, Omnicare relied on several examples of information exchanges that allegedly took place during due diligence prior to closing between United and PacifiCare. First, Omnicare claimed that the parties shared sensitive information relating to their Part D pricing and pricing strategies that enabled the parties to depress

reimbursement rates.[46] Second, Omnicare asserted that United shared information outside of the bounds of the merging parties' confidentiality agreement and provided sensitive due diligence information to personnel not part of the authorized due diligence team for their review and input.[47] In addition, Omnicare alleged that during due diligence, United requested and received information relating to PacifiCare's discounts off of wholesale prices and that the discount PacifiCare shared with United ultimately was the exact rate PacifiCare negotiated with Omnicare.[48] Finally, Omnicare challenged the parties' reciprocal sharing of information during due diligence, asserting that PacifiCare, as the seller, had no need to access United's information and that doing so was further evidence of an agreement between the parties to coordinate reimbursement rates.[49]

However, in affirming the district court's dismissal of Omnicare's claims, the Seventh Circuit concluded that the facts surrounding the parties' exchange of sensitive information were "more consistent with independent than collusive action."[50] The court emphasized that UnitedHealth and PacifiCare adopted various safeguards to mitigate antitrust risks during the due diligence process. Specifically, the parties exchanged only "generalized and averaged" pricing data and used confidentiality agreements to dictate how confidential information would be exchanged.[51] As the district court observed, meetings at which pricing information was discussed were attended only by senior executives who were not responsible for developing the Part D plans and thus unable to use the sensitive information.[52] The district court also noted that although the sharing of information beyond the scope of the confidentiality agreement raised concerns, without further evidence of anticompetitive intent or effect, such conduct was not unlawful.[53] The court observed that PacifiCare's outside counsel reviewed all documents to determine the propriety of sharing them with UnitedHealth.

As to Omnicare's specific allegations concerning disclosure of specific pricing (discount) information, the district court concluded that the exchange was lawful because the information was relevant to executing the merger agreement and the information provided was sufficiently aggregated in that it was average data and ranges that were provided, and the request was limited to certain markets.[54] The court further

stated that it was not presumptively unlawful for Pacificare to receive pricing information from United, concluding that the target has a legitimate interest in learning about the firm that is acquiring it.[55]

3. Guidance for Due Diligence

While the exchange of sensitive documents and information, such as those relating to price, raises significant antitrust concerns if done by competitors, this does not mean that due diligence cannot occur. Parties can engage in due diligence with minimal antitrust risk as long as safeguards are in place to restrict the dissemination of sensitive information between the competing parties.

In all cases, to limit antitrust risk in connection with due diligence, parties should exchange only information that relates to the proposed transaction and is necessary to negotiate the transaction. Before commencing due diligence, the parties should ensure that the dissemination of information during due diligence is subject to a nondisclosure agreement that expressly limits the exchange solely for purposes of due diligence for the contemplated transaction. The parties also should restrict those who have access to due diligence information, to the extent practicable, on a "need to know basis" and exclude individuals who are involved in pricing, payor contracting, or sales and marketing. In this regard, it is reasonable for the disclosing party to approve the individuals who will have access to information on behalf of the receiving party. There should also be provisions requiring return or destruction of all such exchanged information in the event the transaction discussions are terminated or a decision is made not to close the transaction.

There are certain situations in which the parties may elect to share competitively sensitive information through use of a neutral third party or "clean team." This approach enables one party to obtain relevant information about the other party without risk of misuse of the sensitive information. A clean team can be either internal or external, but internal clean teams require great care in the selection of members, development of protocols, and compliance monitoring. It is more common to use a consultant (or, for some purposes, outside counsel) for clean team analyses.

Areas in which clean teams are commonly used are (a)

payor contract analyses; (b) analyses of other competitively significant contracts (e.g., contracts with physicians, joint ventures with providers); and (c) detailed wage and benefit analyses. While the parties individually will supply the underlying data and information to the clean team for evaluation, the clean team will furnish and report its findings back to the parties in an aggregated manner such that the price or cost for any given person or customer is not identifiable. This is best done with guidance and input from antitrust counsel.

4. Categories of Disclosures Raising Significant Antitrust Concerns

Certain categories of information that may be relevant to the negotiation of a proposed health care transaction are particularly sensitive from a competitive standpoint and the process by which any such information is exchanged should be closely managed. These categories include the following:

- Pricing
  - Charge masters
  - Documents containing or discussing pricing policies or strategies
- Payor Contracts and Contracting
  - Stated rates, including base DRG rates
  - Specific rate and discount formulas (including discounts levels, relative value multipliers, etc.)
  - Pricing targets, incentive payments, performance bonuses
  - Most favored nation (MFN) clauses
  - Financial risk-sharing arrangements
  - Exclusivity and exclusion clauses (unless this information is otherwise public)
  - Documents discussing payor (or direct employer) contracting decisions or strategies
  - Bid and proposal documents
  - Disaggregated claims payment data
- Strategic and Business Planning Documents—current (preclosing) strategic or business plans, including but not limited to—
  - Documents discussing initiation, expansion, contraction, or discontinuation of services or service lines

  - Documents discussing expansion into or withdrawal from any geographic area
  - Documents discussing acquisition, divestiture, affiliation, merger, partnership, or alliance with another provider
  - Documents containing or discussing physician recruitment, alignment, or employment strategies
  - Documents containing or discussing marketing and advertising strategies
- Costs
  - Supplier and vendor contract terms (particularly for high-cost or high-volume items)
  - Documents discussing supplier contract negotiations and strategies
  - Line-item budget and cost performance information
  - Employment Information:
    - Compensation data:
      - Wage and salary scales
      - Shift differentials and shift differential policies
      - Overtime rates and policies
      - Executive compensation plans
    - Physician compensation arrangements
    - Plans for changes in compensation policies and strategies
    - Negotiated benefit packages, and other benefit plans/policies that are not public information
    - Collective bargaining agreements

5. Categories of Disclosures Raising Few Antitrust Concerns

By contrast, there is typically less antitrust sensitivity when the following types of information are exchanged during the due diligence process of a health care transaction:

- Ordinary course financial statements
- Tax returns
- Bond documents and other debt instruments
- Aggregated budgets and performance reports
- Organizational charts and similar corporate information

- General workforce information
- Benefit plan legal documents and tax returns
- Insurance and self-insurance information, including loss runs, etc.
- Compliance information (apart from issues of privilege)
- Information concerning IT systems
- Asset and depreciation schedules
- Information relating to locations, facilities, and services offered
- Information regarding pending legal claims
- Information regarding environmental risks
- Any information that is public (or publicly available, e.g., in regulatory filings)
- Information that is more than one-year-old and no longer currently relevant. (For example, strategic documents from prior periods may not be competitively sensitive unless they continue to reflect current, nonpublic strategies.)
- Contracts—For all contracts, the disclosure of general "framework" terms, except price, such as—
    - Parties
    - Subject matter
    - Term and termination provisions
    - Change-of-control provisions
    - Assignability
    - Aggregate or annual cost
- Nonsensitive portions of payor contracts, including—
    - Basic payment methodology (but not rates or conversion factors)
    - Utilization management, case management, reporting, dispute resolution, and similar provisions
    - Overpayment, underpayment, and recoupment provisions
    - Any information that could be obtained from the payor (e.g., a party's status in a tiered network product)

C. Preclosing Planning for Postclosing Operations and Integration

As discussed above, simply because a definitive agreement has been reached (or appears probable) does not mean the

parties are free to integrate and act jointly or share competitively sensitive information. On the contrary, the parties must continue to act as separate competitors.

Comparatively speaking, there has been less antitrust enforcement and therefore less guidance with respect to information exchanges related to integration planning than with respect to due diligence. That said, many of the principles relevant to exchanges of information during due diligence are applicable to the integration planning context.

The agencies' most express statement in support of integration planning is from the FTC's action in *Torrington*. There, the FTC alleged that Torrington and Universal violated the HSR Act and FTC Act for failing to compete independently until the transaction was consummated. Discussing its order, which prohibited the merging parties from consolidating prior to closing, the FTC made clear that the order was not designed to restrict the parties' "planning, independently or jointly, for consolidation of the business or assets after the acquisition is consummated."[56]

The extent to which information can be shared during postsigning integration planning may be less extensive in some respects than during the presigning due diligence process. On the surface, this may seem counterintuitive: parties often assume that their integration teams are free to access whatever may be in the due diligence data room once a deal is signed and the parties are that much closer to combining. But the exchange of competitively sensitive information presigning generally is limited to a smaller group of individuals and can be justified on grounds that the information is critical to formulating the appropriate valuation. Typically, at the time of integration planning, most valuation issues have been resolved, and a broader population of employees and consultants typically become involved in the integration planning process once a transaction has been announced compared to those who are involved in the initial due diligence and negotiation of the agreement. In this regard, implementation planning teams are more likely to include individuals who have the ability to use the other party's information in making preclosing business decisions on behalf of a party—which directly implicates antitrust concerns.

A similar and equally important consideration at the

implementation planning stage is the relevance of the information that will be disclosed. Here, too, parties often assume that, having reached the stage of integration planning, broad disclosures are permissible and even expected. As the decision in *Omnicare* illustrates, however, limiting disclosures to relevant information—that is, ensuring that disclosures are not broader than necessary, is a consistent theme in preclosing antitrust compliance. For example, if two parties expect to consolidate cardiac services postclosing, historical operating information undoubtedly will be relevant to the design of future operations. However, an exchange of the parties' nonpublic strategies for providing cardiac services *independently* (i.e., in the absence of the combination) would rarely, if ever, be necessary to plan a consolidated service line. Integration planning is forward-looking and distinct from the plans of the parties as independent firms.

In general, however, information sharing during postsigning integration planning should be permissible so long as the same precautions with regard to information sharing during due diligence discussed above are followed.[57] Continuing information exchanges postsigning also may be more justified for core integration activities such as accounting and finance, human resources, and information technology, which are less likely to raise antitrust concerns. Finally, to the extent a party engages in *unilateral* planning for integration, without involving the other party, it is free to do so without material antitrust risk.

D. Efficiency Studies

Another legitimate purpose for sharing information prior to closing is in connection with the preparation of an efficiency study. As mentioned at the outset, parties may elect to engage a consultant or expert to evaluate and demonstrate the likely efficiencies and procompetitive benefits that are likely to be achieved as a result of the proposed transaction. These efficiency studies can then be used, for example, to assist in obtaining antitrust and other regulatory approval or by the integration planning teams. Because efficiency studies often require the parties to furnish competitively sensitive information, there is opportunity for improper information exchanges.

The parties and their consultant should enter into a nondisclosure agreement that states the purpose of the assignment, identifies the information that will be provided, and establishes ground rules for review of party information and the consultant's work product. Here, as in other preclosing respects, disclosures should be limited to information reasonably related to the efficiency analysis. The consultant should not be a conduit for disclosures between the parties that could not occur directly. To the extent the consultant's report itself contains competitively sensitive information (or conclusions and recommendations from which such information can be inferred), the consultant (preferably in conjunction with antitrust counsel) should ensure that competitively sensitive information is redacted and/or preclosing distribution of the report is restricted in a manner that minimizes the risk that a party would be in a position to act on the competitively sensitive information of the other party.[58]

IV. Management of Documents and Information

As much of the foregoing discussion may suggest, the management of documents, both historical and transaction-specific, is a critical element of antitrust compliance and transactional strategy. Parties to transactions that come under the scrutiny of state or federal antitrust enforcement officials will have obligations to preserve and produce documents and information, including electronic document files. Those documents often play a critical role in an antitrust agency's decision as to whether to broaden an investigation or to challenge a transaction. Too often, documents read out of context and with the benefit of hindsight sometimes can be interpreted differently than their authors may have intended. Incautious or flippant statements can have damaging consequences.

A. The Obligation to Preserve Documents

In the ordinary course of business, there is no legal requirement for a health care system or any other company to preserve documents and information—except as may be imposed in specific instances by statute or regulation or by contract. (Medicare regulations, for example, impose retention requirements applicable to specific types of records, as do many health plan contracts.) In the context of a govern-

mental antitrust investigation or potential litigation, however, much broader obligations arise to preserve documents. For better or worse, the judicial standards for document preservation are not bright-line measures but rather are dependent on the facts of each case. Although a full exploration of this topic, particularly in light of the expanding scale of electronic discovery, is well beyond the scope of this chapter, certain baseline principles nonetheless can be identified and are important to anticipating and managing antitrust compliance issues.

1. When Does the Obligation Arise?

In the context of litigation, the obligation to preserve evidence not only attaches when a lawsuit is filed but also may arise earlier, when the litigation is "reasonably foreseeable."[59] Most courts apply this standard objectively, such that the obligation arises when a reasonable person would conclude that litigation is probable. Litigation must be more than a mere possibility, but it is not necessary that litigation be "imminent" in order for the obligation to arise.[60]

In circumstances involving a governmental antitrust (or other) investigation, the obligation to preserve documents and information certainly begins when a party becomes (or reasonably should know that it will become) subject to a specific statutory or regulatory reporting mandate, such as the obligation to file a premerger notification under the Hart-Scott-Rodino Act, as well as upon receipt of a civil investigative demand (CID) from an enforcement agency.

Can the obligation arise even earlier in time? For example, what if counsel has concluded long before an HSR filing that an antitrust investigation and agency challenge to a contemplated transaction are highly probable? What if, in advance of any compulsory process, counsel has been contacted by the FTC staff expressing a substantive interest in the transaction and/or requesting a voluntary production of documents? Whether an affirmative obligation exists in the former case may be debatable, but in the latter instance, most counsel would conclude that some degree of affirmative document preservation is required.

A well-known and often-cited federal opinion holds that an employer was obligated to preserve documents relating to an employment discrimination claim prior to the time the em-

ployee actually filed the charge that triggered a governmental (EEOC) investigation because for at least several months in advance of that filing, it was widely anticipated within the company that the employee would, in fact, commence litigation (as shown by, e.g., intracompany correspondence during that time period).[61] This would suggest that in some circumstances, obligations may accrue prior to any indications of interest by a governmental agency.

In an interesting contrast, however, an FTC Administrative Law Judge recently declined to afford relief to the hospital Respondents in a merger challenge on allegations (not contested by the FTC) that the FTC failed to preserve nearly 300 documents created in a nine-month period between the issuance of a Second Request to the Respondents and the date that the FTC staff formally recommended to the Commission that a complaint be filed to block the merger.[62] Among other things, the Respondents sought to compel the production of information relating to communications between FTC staff and health plans concerning their position on the merger. The FTC took the position, subsequently ratified by the ALJ, that the period in question was strictly investigatory and that no recommendation to litigate could have been formed until after the investigatory process concluded—and in fact, the staff could have recommended against a challenge. Consequently, the FTC had no obligation to preserve documents from the period in question.

Although the rationale of the ALJ's decision may seem thin to anyone who has engaged with the FTC in a merger investigation, the decision does at least raise the possibility that the preservation obligations of parties to an antitrust investigation may be limited to the scope of the investigatory requests, at least until the time that the parties are advised of the staff's recommendation. Conversely, the decision may simply illustrate that the rules are different for the Commission.

2. Who Is Obligated?

Although it is sometimes news to counsel, the obligation to preserve documents and information is imposed on legal counsel in the first instance, who then has the responsibility to explain the obligations to the client.[63] In most instances, counsel's first step will be the issuance of a "document hold"

memo to all persons likely to have custody of relevant documents, instructing them to retain all such documents until otherwise notified. However, there is substantial judicial authority indicating that a document hold alone may be inadequate to discharge counsel's obligation.[64] For example, courts have indicated that, depending on the circumstances, counsel may be required to communicate directly with identified custodians, actively coordinate and oversee document preservation and production, and potentially take possession of relevant files and/or computer back-up tapes.[65] In the era of electronically stored information, courts likewise expect counsel to become knowledgeable about their client's information systems and the ability to identify and produce documents stored on those systems.[66]

3. The Scope of the Obligation

In general, a party's obligation is to preserve documents that are "relevant"—a very broad concept under federal and state civil procedure rules that reaches beyond documents containing relevant information to include those that reasonably may lead to the discovery of relevant evidence.[67] Thus, an organization not only must preserve the documents and information necessary to defend its case but also must consider the government's (or, as applicable, private plaintiff's) theory of the case and extend the preservation to the data and documents that may be relevant to the other side.

A number of factors must be considered: the relevant time period, the subject matter of relevant documents, and the location and custodians of potentially relevant information. Custody is not limited to documents in the organization's physical possession. The organization also must identify potentially relevant evidence in the hands of its agents and other third parties that are under the organization's control (meaning that the organization has the "right, authority, or practical ability to obtain the documents from a non-party to the action").[68] Most often, this will require that the organization alert its consultants to the document preservation requirements and ensure that they institute appropriate measures.[69]

One of the most important steps to be taken in this circumstance is the suspension of document destruction policies, not only as they affect active documents and computer files, but also as they affect the destruction or recycling of

back-up files.[70] Of related concern, the continued use of files and databases stored in electronic media may effectively "destroy" relevant information. That is, if the continued use of the company's document files and information databases will alter the information contained in relevant files, those files will need to be copied and preserved (or retrieved from backup) in their prelitigation or preinvestigation form.

B. The Role of Party Documents in Antitrust Enforcement

The federal antitrust enforcement agencies make no secret of the fact that a party's own documents are frequently one of their most productive sources of information when investigating or challenging a proposed transaction. For example, the 2010 revision of the FTC/DOJ Horizontal Merger Guidelines states:[71]

> The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review.

If a merger is reportable under the Hart-Scott-Rodino Act, the production of party documents to the agencies begins with "4(c)" and "4(d)" documents (so called because they are required by Items (4c) and 4(d) of the Notification and Report Form). Both Items are mostly transaction-specific. Item 4(c) requires production of documents prepared by or for a party's officers or directors that evaluate or analyze the proposed transaction in terms of markets, market shares, competition, competitors, or expansion of products, services or geographic markets. Item 4(d), added to the Form in 2011, expands the scope of production to include confidential information memoranda (of the type prepared by investment bankers to shop a potential acquisition target), strategic documents created during the time when a transaction is planned but has not yet taken shape, and analyses of the proposed transaction in terms of expected synergies or efficiencies.

Obviously, consultants, bankers, and (sometimes) lawyers are common sources of 4(c) and 4(d) documents that must be produced by the parties, and this can be a source of concern

if a party's consultants are not careful and judicious in their characterizations of the transaction and the marketplace. However, a party itself also may be (and usually is) a source of responsive documents and, in this regard, it is noteworthy that the commonplace use of e-mail communication has greatly expanded the volume of potentially responsive documents. Every substantive commentary on a 4(c) document or 4(c) topic that is dropped into an e-mail itself becomes a 4(c) document. In the past, many of those commentaries would have occurred on the telephone or in a face-to-face meeting. Today, they reside on mail servers and must be produced to the agencies.

Nonreportable mergers and other transactions that catch the eye of the enforcement agencies may receive a request for voluntary (i.e., noncompulsory) production of documents. These requests typically include documents that would be produced under Items 4(c) and 4(d) in an HSR filing but frequently go beyond the scope of the HSR to include, e.g., business and strategic plans, competitive analyses, and presentations to management committees and boards of directors.

If the agencies' initial review leads to a Second Request—or if a nonreportable transaction becomes the subject of compulsory production (a CID) in an investigation—the scope of document production can be expected to expand dramatically. In particular, parties can expect to produce a significant range of ordinary-course documents prepared over a lengthy historical period—often six years or more.

As examples, the FTC's Model Second Request contains the following specifications:[72]

> Submit all documents relating to the company's or any other person's plans relating to any relevant product [service], including, but not limited to, business plans, short term and long range strategies and objectives; budgets and financial projections; expansion or retrenchment plans; research and development efforts; and presentations to management committees, executive committees, and boards of directors. . . .
>
> Submit all documents relating to competition in the manufacture or sale of any relevant product [each relevant service], including, but not limited to, market studies, forecasts and surveys, and all other documents relating to (a) the market share or competitive position of the company or any of its competitors; (b) the relative strength or weakness of companies

> producing or selling each relevant product [providing each relevant service]; (c) supply and demand conditions; (d) attempts to win customers from other companies and losses of customers to other companies . . . .

Because many documents falling within the scope of a Second Request or CID will have been created prior to (and outside the context of) the transaction that is under scrutiny, they may contain observations and characterizations of the marketplace that may be—or at least may appear to be—at odds with the parties' current views and positions in support of the transaction. Also, given the wide swath cut by such document requests ("submit all documents relating to . . ."), it is not unusual for a party's responses to include documents (particularly e-mails) containing statements expressing arguably anticompetitive (or, at least, poorly considered) viewpoints. Although such statements frequently have little probative value on the economic merits of the transaction, they may be (and frequently are) used to demonstrate anticompetitive intent and thereby impeach a party's arguments regarding the pro-competitive objectives of the transaction. And although "bad" subjective intent alone does not establish that conduct is unlawful, such statements may lead a court to infer a likelihood of anticompetitive effects from ambiguous conduct.[73]

Of course, not all statements of competitive animus are troublesome. An intent to harm or displace one's competitors, standing alone, could hardly be the basis for antitrust liability, as such an outcome is as likely to result from strong competition as from anticompetitive methods.[74] However, where aggressive statements are directed toward customers (e.g., health plans) or are made in a context suggesting an intent to harm competitors by means other than competition on the merits, they may be considered probative.

Such concerns are not hypothetical. "Bad" party documents have played a prominent role in recent FTC investigations and proceedings. For example, in 2011, the FTC contested the acquisition of Sr. Luke's Hospital in Toledo, Ohio, by ProMedica, a Toledo-based hospital system. Among the conclusions reached by the FTC's Administrative Law Judge in partial reliance on party documents were the following:

- The relevant geographic market is narrower than that asserted by the parties, citing a consultant's clinical integration study that examined only Lucas County,

Ohio, and excluded hospitals in surrounding counties.[75]

- ProMedica holds a dominant position in the relevant market, citing a presentation to that effect made by ProMedica to its bond rating agency.[76] This is a good illustration of how documents prepared and used in an entirely different context can become relevant in an antitrust investigation. It would be expected that a health system would make the strongest case possible for its competitive strength in order to obtain a favorable bond rating. However, such contentions may well constrain future arguments that consumers in the market have significant competitive alternatives.
- St. Luke's entered into the transaction with the objective of raising its prices. The ALJ cited numerous St. Luke's documents to the effect that, "An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-SLH partnership would have a lot of negotiating clout."[77] More sensationally, the ALJ also cited comments by members of St. Luke's due diligence team, that a ProMedica affiliation could "stick it to employers, that is, to continue forcing high rates on employers and insurance companies."[78]

Another informative example of the FTC's use of party documents came in the agency's well-publicized 2004 postmerger challenge to Evanston Northwestern Healthcare's (ENH) 2000 acquisition of Highland Park Hospital. That case was premised in large measure on price increases paid by contracting health plans subsequent to the merger, and party documents played a significant role in establishing that price increases were an intended objective of the transaction. For example:

- The Initial Decision of the Administrative Law Judge cited various CEO communications prior to the merger recommending "strengthen[ing] negotiating positions with managed care through merged entities and one voice."[79] In a similar vein, the ALJ cited a report by ENH's CEO that the Highland Park merger would "increase our leverage" with health plans.[80]
- The Initial Decision also cited presentations to the ENH Board indicating that the merger would foreclose the possibility of Highland Park's acquisition by another large system, which would otherwise increase competi-

tive pricing pressures on ENH.[81]

- An internal memorandum from Highland Park Hospital's managed care contracting director detailed the "great potential" for increasing contract rates as a result of the merger.[82]

Outside of health care, the Department of Justice's recent complaint (subsequently settled) challenging to the merger of American Airlines and U.S. Airways, relied heavily on e-mails and other internal party documents to demonstrate the prospect of adverse impact on consumers from the consolidation.

- Internal documents identified continuing airline industry consolidation as enabling fare increases and the imposition of checked baggage, ticket change, and other ancillary customer fees.[83]
- U.S. Airways documents showed that the company was concerned about American's "industry destabilizing" postbankruptcy growth plan and expressed the view that American would emerge from bankruptcy as a strong independent competitor.[84]
- Party documents also undermined any arguments that the parties may have intended to advance that discount air carriers (e.g., Southwest and Jet Blue) were capable of constraining the pricing decisions of the major carriers, noting that the discount carriers tend to sell a different "product" and serve different customer bases.[85]

C. Practical Implications

Obviously, there is little an organization can do about historical documents that are inconsistent with their current views of markets, competition, and competitors. Certainly, the prevalent use of historical planning documents in antitrust litigation argues in favor of not retaining old documents indefinitely, assuming no legal obligation otherwise exists to retain them. Having and following a corporate document destruction policy is a sound practice—and one that, frankly, is alien to many health care organizations. Many hospitals and health systems take the same archival approach to management documents that they do to patient records even though there is rarely reason to do so.

At a more general level, hospitals and health systems (in particular) should be educated to appreciate the fact that

they operate in markets that typically do not evidence a high degree of structural competition. Consequently, the risks of being under the scrutiny of an antitrust agency at some point in time are greater for many health care providers than for firms in other lines of business. That being the case, hospitals and health systems should exercise care, as a matter of policy and routine, in committing information to paper (or to data bytes) and, particularly, in the words that are used to convey strategies and subjective impressions of competition and competitors. If every document were created under the assumption that it could be read by the FTC, it is likely that documents would be more factual, concise, and focused than often proves to be the case.

Once an organization is entering into the process of identifying a strategic partner or evaluating and negotiating a strategic opportunity, the organization must pay attention to the practical aspects of document creation and management. Executives and other staff who will be involved in the process should be reminded of good document practices. It is also imperative that an organization's consultants receive the same messages.

- As noted, the parties should assume that every document produced in relation to the transaction or discussing any competitive activity (whether or not related to the transaction) will be discoverable by federal and state antitrust agencies in the event of an investigation. Care should be taken to avoid hyperbolic statements and the use of words ("dominate," "leverage," etc.) that can carry anticompetitive overtones.
- Minutes (in the traditional sense) are not necessary for every integration planning or merger-related committee. Agendas and "to-do" summaries of meetings are typically sufficient, whereas a who-said-what record of discussions is almost always unnecessary and frequently can be misleading.
- In the same vein, every meeting does not require a PowerPoint presentation.
- The biggest source of documentary issues in antitrust investigations is e-mail. E-mails are not private and are never truly deleted. Nothing should be written in an e-mail that the sender would not want to become public in an investigation.

- E-mails (and other written communications) also tend to convey more abbreviated messages without the context of an in-person or telephone conversation. Consequently, written communications read out of context and in hindsight can convey a different message than the sender originally intended.
- Documents and communications concerning the proposed transaction generally should focus on the expected benefits in terms relevant to consumers, e.g., higher quality, greater availability of services, more efficient production, lower or stable prices, etc. Documents focusing solely on economic gains and profitability usually are not helpful from an antitrust standpoint, at least in the absence of a related discussion of how profits will be reinvested in ways that respond to documented consumer demand.

NOTES:

[1]*See* Mary Lou Steptoe, Premerger Coordination/Information Exchange—FTC Competition Bureau Acting Director's Views, Remarks Before the ABA Section of Antitrust Law (Apr. 7, 1994); W. Blumenthal, The Rhetoric of Gun-Jumping, Remarks Before the Association of Corporate Counsel Annual Antitrust Seminar of Greater New York Chapter (Nov. 10. 2005).

[2]*See* Statement of R. Hewitt Pate, Before the Committee on the Judiciary of the United States House of Representatives Concerning Antitrust Enforcement Oversight (July 24, 2003) ("We have also been very active in cases related to our merger enforcement program, filing several cases against 'gun-jumping' and other violations of the Hart-Scott-Rodino premerger notification and waiting period requirements. It is important that merging parties strictly adhere to the requirements of the HSR Act and maintain their companies as separate and independent firms during the HSR waiting period.").

[3]Competitive Impact Statement at 9, *United States v. Computer Assocs. Int'l Inc.,* No. 01-02062 (D.D.C. Apr. 23, 2002).

[4]Section 5 of the FTC Act, 15 U.S.C. § 45(a), gives the FTC the authority to challenge "unfair methods of competition" that may otherwise constitute a violation of the Sherman Act. *See, e.g.,* In The Matter of Insilco Corporation, 125 F.T.C. 293, 1998 WL 34077349 (1998); In The Matter of Commonwealth Land Title Insurance Company, 126 F.T.C. 680, 1998 WL 34300624 (1998); Matter of The Torrington Co., 114 F.T.C. 283, 1991 WL 11008516 (1991).

[5]Merging firms are more likely to face allegations of anticompetitive premerger coordination where the agencies have received notice of the

transaction though HSR notification. However, nonreportable transactions may be subject to government review. *See, e.g.,* In The Matter of Insilco Corporation, 125 F.T.C. 293, 1998 WL 34077349 (1998); In The Matter of Commonwealth Land Title Insurance Company, 126 F.T.C. 680, 1998 WL 34300624 (1998). In recent years, the agencies have challenged a number of nonreportable transactions, particularly within the health care sector. Although these transactions were challenged postconsummation, the actions suggest that the agencies continue to monitor nonreportable transactions. *See, e.g.,* Administrative Complaint, *In the Matter of ProMedica Health System, Inc., a corporation,* 2011-1 Trade Cas. (CCH) ¶ 77395 (January 6, 2011), *available at* http://www.ftc.gov/os/adjpro/d9346/110106promedicacmpt.pdf.

[6]15 U.S.C.A. § 1.

[7]Parties that have agreed to merge but have not yet consummated the transaction are capable of conspiring in violation Section 1. *See* Omnicare, Inc. v. Unitedhealth Group, Inc., 524 F. Supp. 2d 1031, 2007-2 Trade Cas. (CCH) ¶ 75950 (N.D. Ill. 2007) (In denying defendants' motion to dismiss Omnicare's antitrust claim, the district court distinguished International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1993-1 Trade Cas. (CCH) ¶ 70190 (8th Cir. 1993), an Eighth Circuit case in which the court affirmed a jury verdict finding merging parties incapable of conspiring in violation of Section 1 on the basis that they lacked independent economic consciousness after agreeing to merge. According to the district court, *International Travel Arrangers* stood only for "the proposition that it would be *possible* for a jury to find that a merger agreement, as a factual matter, had so combined two organizations that they had no separate mind, after the agreement had been made.").

[8]*See, generally*, U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[9]*See, e.g.,* Complaint for Equitable Relief and Civil Penalties ¶ 58, *United States v. Gemstar-TV Guide Int'l, Inc.* 2003-2 Trade Cas. (CCH) ¶ 74,082 (D.D.C. 2003) (No. 03-00198) *available at* http://www.justice.gov/atr/cases/f200700/200737.html (customer allocation); Complaint for Equitable Relief and Civil Penalties ¶ 37, *United States v. Computer Assocs. Int'l, Inc.,* 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062) *available at* http://www.justice.gov/atr/cases/f9200/9246.htm (price-fixing); In The Matter of Insilco Corporation, 125 F.T.C. 293, 1998 WL 34077349 (1998) (price-fixing); In The Matter of Commonwealth Land Title Insurance Company, 126 F.T.C. 680, 1998 WL 34300624 (1998) (price-fixing); Matter of The Torrington Co., 114 F.T.C. 283, 1991 WL 11008516 (1991) (customer allocation).

[10]15 U.S.C.A. § 18a(a).

[11]*See* Revised Jurisdictional Thresholds of the Clayton Act, 79 Fed. Reg. 3814 (Jan. 23, 2014). The dollar thresholds stated here are those in effect as of February 2014. The thresholds are adjusted annually.

[12]If either agency determines that further inquiry is necessary, a Request for Additional Information and Documentary Material (more

commonly and euphemistically known as a "Second Request") will issue. A Second Request extends the waiting period, providing the reviewing agency with additional time to review the transaction for anticompetitive concerns and to take appropriate action before the transaction is consummated.

[13]*See* Final Judgment. *United States v. Input/Output, Inc.,* 1999-1 Trade Cas. (CCH) ¶ 72,528 (D.D.C. 1999) (No. 99-00912), *available at* http://www.usdoj.gov/atr/cases/f203600/203653.htm.

[14]15 U.S.C.A. § 18A(g)(1).

[15]43 Fed. Reg. 33,450, 33,458 (1978).

[16]*See* U.S. v. Titan Wheel Intern., Inc., 1996-1 Trade Cas. (CCH) ¶ 71406, 1996 WL 351143 (D.D.C. 1996) (acquisition of assets conveyed beneficial ownership); U.S. v. Atlantic Richfield Co., 1991-1 Trade Cas. (CCH) ¶ 69318, 1991 WL 290711 (D.D.C. 1991) (payment of acquisition price and assumption of rights to gains and losses conveyed beneficial ownership); U.S. v. Atlantic Richfield Co., 1992-1 Trade Cas. (CCH) ¶ 69695, 1992-1 Trade Cas. (CCH) ¶ 69803, 1992 WL 26686 (D.D.C. 1992) (right to vote all of target's shares conveyed beneficial ownership).

[17]*See* Complaint for Equitable Relief and Civil Penalties ¶ 58, *United States v. Gemstar-TV Guide Int'l, Inc.* 2003-2 Trade Cas. (CCH) ¶ 74,082 (D.D.C. 2003) (No. 03-00198) *available at* http://www.justice.gov/atr/cases/f200700/200737.html; Complaint ¶¶ 13–16, *United States v. Input/Output, Inc.,* 1999-1 Trade Cas. (CCH) ¶ 72,528 (D.D.C. 1999) (No. 99-00912), *available at* http://www.ftc.gov/os/1998/01/insilcocmp.pdf.

[18]*See* Complaint ¶ 20, *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. Jan. 25, 2010), *available at* http://www.justice.gov/atr/cases/f254300/254369.htm; Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act ¶¶ 30–33, *United States v. Qualcomm Inc. (D.D.C. 2006) (No. 06-00672), available at* http://www.justice.gov/atr/cases/f215600/215608.htm; Complaint for Equitable Relief and Civil Penalties ¶ 58, *United States v. Gemstar-TV Guide Int'l, Inc.* 2003-2 Trade Cas. (CCH) ¶ 74,082 (D.D.C. 2003) (No. 03-00198) *available at* http://www.justice.gov/atr/cases/f200700/200737.html; Complaint for Equitable Relief and Civil Penalties ¶ 37, *United States v. Computer Assocs. Int'l, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062) *available at* http://www.justice.gov/atr/cases/f9200/9246.htm.

[19]*See, generally*, Blumenthal, The Scope of Permissible Coordination Between Merging Entities Prior to Consummation, 63 Antitrust L.J. 1 (1994) (discussing transfer of beneficial ownership analysis).

[20]*See* Final Judgment, *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. Jan. 25, 2010), *available at* http://www.justice.gov/atr/cases/f258600/258640.pdf; Competitive Impact Statement §§ II.B.2, II.C.2, *United States v. Computer Assocs. Int'l, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062), *available at* http://www.justice.gov/atr/cases/f11000/11082.htm.

[21]Competitive Impact Statement §§ II.B.2, II.C.2, *United States v.*

Computer Assocs. Int'l, Inc., 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062), *available at* http://www.justice.gov/atr/cases/f11000/11082.htm (Recognizing that some covenants are acceptable as a means of protecting the value of the transaction, including provisions that restrict seller's rights to: "(1) declare or pay dividends or distributions of its stock; (2) issue, sell, pledge, or encumber its securities; (3) amend its organizational documents; (4) acquire or agree to acquire other businesses; (5) mortgage or encumber its intellectual property or other material assets outside the ordinary course; (6) make or agree to make large new capital expenditures; (7) make material tax elections or compromise material tax liabilities; (8) pay, discharge or satisfy any claims or liabilities outside the ordinary course; and (9) commence lawsuits other than routine collection of bills.").

[22]Competitive Impact Statement §§ II.B.2, II.C.2, United *States v. Computer Assocs. Int'l, Inc.,* 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062), *available at* http://www.justice.gov/atr/cases/f11000/11082.htm.

[23]*See* Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act ¶¶ 30–33, *United States v. Qualcomm Inc. (D.D.C. 2006) (No. 06-00672), available at* http://www.justice.gov/atr/cases/f215600/215608.htm.

[24]U. S. v. Citizens and Southern Nat. Bank, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41, 1975-1 Trade Cas. (CCH) ¶ 60360 (1975) ("[T]he dissemination of price information is not a per se violation of the Sherman Act.").

[25]U.S. v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854, 1978-1 Trade Cas. (CCH) ¶ 62103 (1978).

[26]U.S. v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854, 1978-1 Trade Cas. (CCH) ¶ 62103 (1978); Todd v. Exxon Corp., 275 F.3d 191, 2001-2 Trade Cas. (CCH) ¶ 73518 (2d Cir. 2001).

[27]U.S. v. U.S. Gypsum Co., 438 U.S. 422, 441, 98 S. Ct. 2864, 57 L. Ed. 2d 854, 1978-1 Trade Cas. (CCH) ¶ 62103 (1978); U.S. v. Container Corp. of America, 393 U.S. 333, 335–337, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969); Todd v. Exxon Corp., 275 F.3d 191, 2001-2 Trade Cas. (CCH) ¶ 73518 (2d Cir. 2001).

[28]Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526, R.I.C.O. Bus. Disp. Guide (CCH) P 6603, 1987-1 Trade Cas. (CCH) ¶ 67530 (9th Cir. 1987).

[29]Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at 11, *Federal Trade Commission v. OSF Healthcare System,* No. 11-cv-50344 (N.D. Ill. Nov. 18, 2011). The court agreed, concluding that the FTC had established a heightened a risk of coordinated activity by the hospitals in Rockford after the merger and citing in particular past efforts by the hospitals to coordinate health plan contracting strategies. Memorandum Opinion and Order at 29–30, *Federal Trade Commission v. OSF Healthcare System,* No. 11-cv-50344 (N.D. Ill. Apr. 5, 2012).

[30]U.S. v. Container Corp. of America, 393 U.S. 333, 335–337, 89 S. Ct.

510, 21 L. Ed. 2d 526 (1969).

[31]Maple Flooring Mfrs.' Ass'n v. U. S., 268 U.S. 563, 567, 45 S. Ct. 578, 69 L. Ed. 1093 (1925); *see also* International Healthcare Management v. Hawaii Coalition For Health, 332 F.3d 600, 607–609, 2003-1 Trade Cas. (CCH) ¶ 74053 (9th Cir. 2003) (upholding physicians joint negotiation of a provider plan where there was no intention to fix prices).

[32]*See, e.g.,* Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* 63–64 (1996). This agency guidance arises in the context of creating a safety zone for competing health care providers that wish to participate in surveys concerning their prices and what they pay their personnel in salaries, wages, and benefits.

[33]*See, e.g.,* Todd v. Exxon Corp., 275 F.3d 191, 2001-2 Trade Cas. (CCH) ¶ 73518 (2d Cir. 2001); Fleischman v. Albany Medical Center, 728 F. Supp. 2d 130, 2010-2 Trade Cas. (CCH) ¶ 77177 (N.D. N.Y. 2010).

[34]William Blumenthal, Gen. Counsel, Fed. Trade Comm'n, The Rhetoric of Gun Jumping, Remarks before the Association of Corporate Counsel Annual Antitrust Seminar of Great New York: Key Developments in Antitrust for Corporate Counsel 4–6 (Nov. 10, 2005).

[35]Morse, Mergers & Acquisitions, Antitrust Limitations on Conduct Before Closing, 57 No. 4 Bus. Law. 1463, 1463–1486 (Aug. 2002).

[36]In The Matter of Insilco Corporation, 125 F.T.C. 293, 294–95, 1998 WL 34077349 (1998).

[37]In The Matter of Insilco Corporation, 125 F.T.C. 293, 294–95, 1998 WL 34077349 (1998).

[38]In The Matter of Insilco Corporation, 125 F.T.C. 293, 297, 1998 WL 34077349 (1998).

[39]Complaint ¶¶ 25, 37, *United States v. Computer Assocs. Int'l, Inc.,* No. 01-cv-2062 (D.D.C. Apr. 23, 2002).

[40]Complaint ¶ 60, *United States v. Gemstar-TV Guide Int'l, Inc.,* No. 03-cv-198 (D.D.C. Feb. 6, 2003).

[41]Complaint ¶ 61, *United States v. Gemstar-TV Guide Int'l, Inc., No.* 03-cv-198 (D.D.C. Feb. 6, 2003).

[42]Complaint ¶ 15, *United States v. Input/Output, Inc.,* No. 99-912 (D.D.C. Apr. 12, 1999).

[43]Final Judgment at 6, *United States v. Gemstar-TV Guide Int'l, Inc.,* No. 03-cv-198 (D.D.C. July 11, 2003).

[44]Final Judgment at 4–5, *United States v. Computer Assocs. Int'l, Inc.,* No. 01-cv-2062 (D.D.C. Apr. 23, 2002).

[45]Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[46]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 969, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[47]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945,

969, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[48]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 970, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[49]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 971, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[50]Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 720, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[51]Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 720, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[52]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 969, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[53]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 969, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[54]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 971, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[55]Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 971, 2009-1 Trade Cas. (CCH) ¶ 76612 (N.D. Ill. 2009), aff'd, 629 F.3d 697, 2011-1 Trade Cas. (CCH) ¶ 77304 (7th Cir. 2011).

[56]Torrington Co., Analyses to Aid Public Comment, 56 Fed. Reg. 7712, 7714 (F.T.C. Feb. 25, 1991).

[57]*See* Morse, Mergers & Acquisitions, Antitrust Limitations on Conduct Before Closing, 57 No. 4 Bus. Law. 1463, 1483 (Aug. 2002); Blumenthal, The Scope of Permissible Coordination Between Merging Entities Prior to Consummation, 63 Antitrust L.J. 1, 56–57 (1994).

[58]Where such an analysis will be conducted internally, the same considerations would apply, with particular attention to the creation of a "Chinese Wall" between those staff conducting the analysis and those responsible for the competitive operations of the parties.

[59]Micron Technology, Inc. v. Rambus Inc., 645 F.3d 1311, 98 U.S.P.Q.2d 1693 (Fed. Cir. 2011); Dardeen v. Kuehling, 213 Ill. 2d 329, 290 Ill. Dec. 176, 821 N.E.2d 227, 271 (2004) ("a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action").

[60]Micron Technology, Inc. v. Rambus Inc., 645 F.3d 1311, 1320, 98 U.S.P.Q.2d 1693 (Fed. Cir. 2011).

[61]Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).

[62]Order Denying Respondents' Motion to Compel Deposition and Docu-

ments from Complaint Counsel, In re OSF Healthcare System and Rockford Health System, No. 9349 (FTC Mar. 27, 2012).

[63]*See, e.g.,* Telecom Intern. America, Ltd. v. AT & T Corp., 189 F.R.D. 76, 81 (S.D. N.Y. 1999). Indeed, some courts have emphasized that the determination that a duty to preserve evidence exists should not be placed in the hands of a nonlawyer. *See, e.g.,* Clark Const. Group, Inc. v. City of Memphis, 229 F.R.D. 131, 136–37, 62 Fed. R. Serv. 3d 27 (W.D. Tenn. 2005) (holding, in a construction dispute, that an onsite construction project manager should not have been permitted to determine whether copies of documents that contained hand-written notes were "relevant" and, thus, the documents should not have been destroyed).

[64]Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432, 94 Fair Empl. Prac. Cas. (BNA) 1, 85 Empl. Prac. Dec. (CCH) P 41728 (S.D. N.Y. 2004).

[65]Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 433–34, 94 Fair Empl. Prac. Cas. (BNA) 1, 85 Empl. Prac. Dec. (CCH) P 41728 (S.D. N.Y. 2004); *see also* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 630, 68 Fed. R. Serv. 3d 1181 (D. Colo. 2007) (sanctions imposed on counsel who did not follow through after issuing document hold); Phoenix Four, Inc. v. Strategic Resources Corp., 2006 WL 1409413, *5, *9 (S.D. N.Y. 2006) (sanctions for "ineffectual oversight" of document production).

[66]*See, e.g.,* Johnson v. Kraft Foods North America, Inc., 238 F.R.D. 648, 655, 66 Fed. R. Serv. 3d 1237 (D. Kan. 2006); *see also* Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd., 348 F. Supp. 2d 332, 336–37 (D.N.J. 2004).

[67]Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998); Wm. T. Thompson Co. v. General Nutrition Corp., Inc., 593 F. Supp. 1443, 1455, 1985-1 Trade Cas. (CCH) ¶ 66325, 39 Fed. R. Serv. 2d 1187 (C.D. Cal. 1984) ("a litigant is . . . under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request"); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003) (litigant and counsel must preserve any unique evidence that it knows or should know is relevant to litigation); In re Wechsler, 121 F. Supp. 2d 404, 415, 2001 A.M.C. 312 (D. Del. 2000) (holding that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence).

[68]Bush v. Ruth's Chris Steak House, Inc., 286 F.R.D. 1, 11 (D.D.C. 2012).

[69]*See, e.g.*, In re WRT Energy Securities Litigation, 246 F.R.D. 185, 199–201 (S.D. N.Y. 2007) (issuing spoliation sanctions against plaintiff who allowed third party to destroy documents plaintiff knew were relevant to ongoing lawsuit).

[70]*See, e.g.*, Stevenson v. Union Pacific R. Co., 354 F.3d 739, 747–48, 63 Fed. R. Evid. Serv. 166, 57 Fed. R. Serv. 3d 617 (8th Cir. 2004) (holding that defendant railroad violated its duty to preserve evidence when it failed to suspend an otherwise appropriate records destruction policy in

which audio recording tapes were recycled every 90 days).

[71]U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), § 2.21, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[72]Federal Trade Commission, Model Request for Additional Information and Documentary Material (Second Request) (June 2010), Specifications 6, 7, at 6, *available at* http://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide3.pdf.

[73]General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 1984-2 Trade Cas. (CCH) ¶ 66205 (7th Cir. 1984). *See also* U.S. v. Dentsply Intern., Inc., 277 F. Supp. 2d 387, 453, 2003-2 Trade Cas. (CCH) ¶ 74120 (D. Del. 2003), judgment rev'd on other grounds and remanded, 399 F.3d 181, 2005-1 Trade Cas. (CCH) ¶ 74706 (3d Cir. 2005) ("even the [government] admits that 'bad' intent alone [does] not establish that conduct is anticompetitive where the conduct appears objectively incapable of harming competition").

[74]*See, e.g.,* Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379, 1986-1 Trade Cas. (CCH) ¶ 67189 (7th Cir. 1986) (in which, referring to plaintiff, defendant stated, "these turkeys ought to be flushed"); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101, 1113, 1989-2 Trade Cas. (CCH) ¶ 68718 (1st Cir. 1989) (defendant expressed desire to "crush" plaintiff).

[75]Initial Decision ¶ 325, *In re ProMedica Health System, Inc.* (FTC Dec. 12, 2011).

[76]Initial Decision ¶ 604, *In re ProMedica Health System, Inc.* (FTC Dec. 12, 2011).

[77]Initial Decision ¶ 598, *In re ProMedica Health System, Inc.* (FTC Dec. 12, 2011).

[78]Initial Decision ¶ 599, *In re ProMedica Health System, Inc.* (FTC Dec. 12, 2011).

[79]Initial Decision ¶¶ 331, 332, *In re Evanston Northwestern Healthcare Corporation* (FTC Oct. 20, 2005).

[80]Initial Decision ¶ 335, *In re Evanston Northwestern Healthcare Corporation* (FTC Oct. 20, 2005).

[81]Initial Decision ¶ 334, *In re Evanston Northwestern Healthcare Corporation* (FTC Oct. 20, 2005).

[82]Initial Decision ¶ 348, *In re Evanston Northwestern Healthcare Corporation* (FTC Oct. 20, 2005).

[83]Complaint ¶¶ 4, 35, *United States v. U.S. Airways Group, Inc.* (D.D.C. Sept. 5, 2013).

[84]Complaint ¶¶ 9, 22, *United States v. U.S. Airways Group, Inc.* (D.D.C. Sept. 5, 2013).

[85]Complaint ¶ 47, *United States v. U.S. Airways Group, Inc.* (D.D.C. Sept. 5, 2013).