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Hospital Insolvency's Effect On Competition

Introduction

This paper will examine how hospital insolvency influences competition and what may happen in the future. There are three parts to this paper. First, this paper will examine what affects federal bankruptcy laws have on healthcare competition. Second, this paper will examine private alternatives to bankruptcy and insolvency. Third, this paper will conclude with an examination of the effects of Covid-19 on hospitals and its relation to competition. Below is a brief summary of the findings.

First, federal bankruptcy laws affect competition pertaining to hospitals. Chapter 9 bankruptcy will likely maintain competition since the government can not be compelled to liquidate assets. Chapter 11 bankruptcy may decrease competition in instances such as Morehead Memorial Hospital's acquisition by the University of North Carolina. This acquisition helps strengthen UNCHCS' bargaining power with insurers within and outside of this market place. Alternatively, chapter 11 bankruptcy may protect against a dominant hospital. For example, West Penn had acquired several hospitals from a bankrupt firm and used the hospitals to compete with a larger hospital network.

Second, this paper details three private alternatives to insolvency. First, merging or acquiring hospitals has been very common for some time now. Mergers and acquisitions protect a hospital who is facing insolvency by taking responsibility for the debt and hospital. If purchased in bankruptcy, the purchaser is not responsible for the hospital's debts. Second, insurance companies may protect hospitals from insolvency. If bankruptcy will reduce competition, prices will increase. Since these prices are paid by insurance companies, insurance companies have an interest in keeping struggling firms afloat. Third, private equity firms may be willing to purchase a part of or the entire hospital. The money from this purchase can be used to pay existing debts. It is unlikely the purchase of a minority interest will be anticompetitive; however, private equity firms may create hospital networks that may be anticompetitive.

Third, Covid-19 has already impacted, and will continue to impact hospitals. Private equity has invested significant amounts into healthcare providers over the past several years but has cut back recently with Covid-19. However, once Covid-19 passes, private equity will likely continue purchasing hospitals. This is likely since many hospitals will likely be cheaper than they were before Covid-19. Investments from private equity firms will likely maintain healthcare competition in markets where minority or majority interests are purchased. If private equity firms begin aggressively purchasing healthcare providers, competition may decrease. The failing firm defense will likely reduce hospital competition over the next few years. Many hospitals will face insolvency because of Covid-19, therefore failing firm defense will be available more frequently. Before Covid-19, many hospitals were in poor financial situations. Now that Covid-19 has impacted many hospitals' financials, many hospitals will be forced to file for bankruptcy. Lastly, telehealth is helping, and may continue to help, hospitals stabilize their finances and prevent insolvency. Alternatively, major telehealth companies may begin to gain non-trivial amounts of market share across the country and seriously compete with hospitals.

Federal Bankruptcy Laws

This section will first examine how federal bankruptcy laws have affected hospital competition in four sections. First, this paper will briefly examine the effects of chapter 11 bankruptcy. Second, the paper will examine the effects of Chapter 9 bankruptcy. Third, the long term effects of Allegheny, Health, Education, and Research Foundation’s bankruptcy in Philadelphia and Pittsburgh will be examined. Fourth, this paper will examine Morehead Memorial Hospital’s bankruptcy.

First, this paper found that chapter 11 bankruptcies' effect on competition is circumstantial. Whether the bankruptcy will support or limit competition depends on whether the debtor survives the proceeding, local market concentration, and whether the assets will close.

Second, chapter 9 bankruptcy supports competition. Chapter 9 bankruptcy applies to municipalities and municipalities can not be forced to liquidate assets and do not need creditor approval of a bankruptcy deal. Therefore, a publicly owned hospital may continue to compete in local markets during and after chapter 9 bankruptcy. Typically, municipalities do not own large hospital networks but may compete with them.

Third, this paper examines Allegheny Health, Education, and Research Foundation’s (AHERF) bankruptcy effect on the Philadelphia and Pittsburgh market. Philadelphia is oversaturated with several large hospital networks vying for market share. Half of AHERF’s former hospitals in Philadelphia have closed. It is unlikely AHERF’s departure from Philadelphia significantly affected competition. Pittsburgh is very different from Philadelphia and only has two major healthcare providers. To perverse market competition, an insurance company significantly helped the smaller hospital network survive. Had AHERF's hospitals closed or been sold to the larger hospital network, there would have been significant market domination by a single provider.

Fourth, this paper will examine Morehead Memorial Hospital's bankruptcy and acquisition by the University of North Carolina. Morehead was a rural hospital which, after incurring significant debt, filed for chapter 11 bankruptcy. The effects of rural hospital acquisitions are briefly discussed in this section.

I. Chapter 11's effect on competition

It is difficult to determine in advance how chapter 11 bankruptcy will affect an insolvent healthcare provider's financial situation[1]. Chapter 11 bankruptcies are particularly well suited for firms that are upside down in terms of value and debt[2]. During a chapter 11 bankruptcy proceeding, a hospital may have a portion of, or their entire firm, liquidated or use the proceeding to restructure debt[3]. Alternatively, a hospital may use chapter 11 as a means to buy time to postpone the sale of the hospital. For example, if a hospital has received an offer they do not wish to accept, but may be forced to, the hospital can postpone acceptance of the deal by declaring bankruptcy[4].

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[1] BY TRIMMING AN INDUSTRY AT OVERCAPACITY THROUGH MERGERS VS. CHAPTER 11 REORGANIZATIONS, 25 Bank. Dev. J. 147, 173.
[2]Troubled Transactions: Why There's Still Hope for Financially Struggling Hospitals, Becker's Hospital Review (2014), https://www.beckershospitalreview.com/hospital-transactions-and-valuation/troubled-transactions-why-there-s-still-hope-for-financially-struggling-hospitals.html (last visited Nov 23, 2020).
[3] *Id.*
[4] *Id.*

This allows the hospital to use reorganization as a way of waiting for a more desirable offer[5].

When a hospital network's assets are liquidated, the assets will either be sold or close. The effect on competition will depend on the local market the assets operate in. If the market is highly concentrated, closure will have anticompetitive effects. If the hospital closes, the hospitals with the largest pre-existing market share will no longer need to compete with this hospital to keep prices low. Alternatively, if the hospital is sold, the competitive effects will depend on who the purchaser is and the local market. If, as a result of the purchase, the purchasing firm now has a significant market share, or it already had a significant market share, which the purchase increased, the purchase likely has anticompetitive effects.

A. Chapter 11 prepackages effect on competition

A prepackaged chapter 11 bankruptcy involves deciding on the terms of the settlement and getting the creditor votes needed, then filing for bankruptcy[6]. The bankruptcy code allows for a shortened chapter 11 case for prepacks[7]. Prepacks benefit the debtor by reducing the cost of litigation, making the proceeding less disruptive to day-to-day operations, avoiding publicity, and maintaining greater normality with other parties[8]. Prepacks also allow for generating the needed money for the prepacks before

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[5] *Id.*
[6] Distressed Mergers and Acquisitions, (2013), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22377.13.pdf (last visited Nov 23, 2020).
[7] *Id.*
[8] *Id.*

filing for bankruptcy[9]. For example, a bond offering with favorable terms can be used to generate the needed funds to pay creditors. The debtor can then file for bankruptcy and pay the creditors with the money from the bond offering[10].

Prepacks affect competition in several ways. First, they allow more financing options, which may help the hospital survive the proceedings. Second, they save the debtor part of the significant costs of litigation, which can instead be used to repay debt. Lastly, hospitals with prepacks enter bankruptcy with a solution and do not need to wait on other private bidders, which reduces, but does not eliminate, the risk a close competitor will purchase their assets.

II. Chapter 9 effect on competition

Chapter 9 bankruptcy is designed to protect municipalities from their creditor(s)[11]. Chapter 9 differs from chapter 11 since municipalities can not be compelled to liquidate their assets and the bankruptcy court's powers are significantly limited[12]. The municipality can continue to operate the hospital even if creditors have voted against confirmation and have not been fully repaid[13]. Since Chapter 9 does not require the sale of any assets, it has pro-competitive effects. Since an insolvent, publicly owned hospital can operate after Chapter 9 bankruptcy, even though it would not be able to under chapter 11, market share does not transfer to larger health networks. Furthermore, the

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[9] *Id* at 42.
[10] *Id.*
[11] Chapter 9 - Bankruptcy Basics, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics (last visited Nov 23, 2020).
[12] *Id.*
[13] Brian R Hayag, Public Hospital Bankruptcy Under Chapter 9: A Success Story Pillsbury LLC (2016), https://www.pillsburylaw.com/en/news-and-insights/public-hospital-bankruptcy-under-chapter-9-a-success-story.html (last visited Nov 23, 2020).

locally owned hospital can compete with other local hospitals to keep healthcare prices low.

III. Allegheny Health, Education, and Research Foundation's bankruptcy

In this section, I will examine the long term effects of AHERF's bankruptcy on healthcare competition in Pittsburgh and Philadelphia. I will examine AHERF's bankruptcy for two reasons. First, AHERF is the largest healthcare system to declare bankruptcy. Second, The aftermath of AHERF's bankruptcy allows for an examination of the effects of bankruptcy in Philadelphia, a fiercely competitive market, and Pittsburgh, a very consolidated market.

The effects of AHERF's bankruptcy in Philadelphia and Pittsburgh demonstrate the effects of bankruptcy on competition is highly circumstantial. If the bankruptcy is in a competitive market such as Philadelphia, the bankruptcy is not likely to have a meaningful effect on competition. If the bankruptcy is in a highly concentrated market, and the hospitals are not acquired by the dominant provider, the hospitals will be used to promote competition and will likely survive.

A. AHERF's bankruptcy

AHERF filed for bankruptcy in 1998 with $1.5 billion in debt[14]. Before filing for bankruptcy, AHERF was the largest statewide integrated delivery system in Pennsylvania and owned the largest medical school in the United States[15]. AHERF had

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[14]Lawton R Burns et al., The Fall Of The House Of AHERF: The Allegheny Bankruptcy (2000) at 7.
[15] *Id.*

14 hospitals with 29,500 employees[16]. The medical school enrolled about 3,300 students a year, and a physician practice management employed over 500 physicians[17].

Before filing for bankruptcy, AHERF closed the Mount Sinai Hospital and layed off 1,700 people in October 1997[18]. A deal to sell six Philadelphia-area hospitals to Vanguard Health Systems Inc. failed in June of 1998 after AHERF's financial situation was disclosed[19]. In July of 1998, AHERF files for bankruptcy[20].

By October of 1998, AHERF had agreed to sell its entire Philadelphia portfolio, including eight hospitals, its medical practices, and the medical school to Tenet Healthcare Corporation for $345 million[21]. At the time of the sale, Philadelphia was a fiercely competitive market with five major academic medical centers[22]. West Penn Allegheny Health System (WPAHS) was formed in 1999 between a merger of West Penn Hospital, and all four of AHERF's Pittsburgh hospitals.

B. Philadelphia hospitals under Tenet Healthcare Corporation's control

At the time of the purchase, these hospitals, in the eleven months ending in May 31, 1998, had a gross revenue of $950 million with an operating loss of $115 million[23].

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[16] *Id.*
[17] *Id.*
[18]Lawton Robert Burns & James Joo-Jin, Lessons from the Allegheny Bankruptcy (2019).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Scott Hensley, Tenant Closes 8-Hospital AHERF Deal Modern Healthcare (1998), https://www.modernhealthcare.com/article/19981116/PREMIUM/811160327/tenet-closes-8-hospital-aherf-deal (last visited Nov 23, 2020).

On May 1st, 2000, Tenet closed City Avenue Hospital[24]. Tenet closed Parkview Hospital on September 8, 2003[25] Elkins Park Hospital was sold to the Albert Einstein Healthcare Network in 2003[26]. Tenant grossed about $13 million from the sale of Elkins Park Hospital[27]. Thomas Jefferson University may acquire Einstein Healthcare Network, depending on the result of antitrust litigation with the FTC[28]. If Jefferson can complete the acquisition, Jefferson will likely close Elkins Park Hospital and replace it with various other medical services to fit their network's needs[29]. MCP Hospital closed in February of 2004 [30]. In the months prior to its closure, MCP Hospital was losing over $5 million per month[31] In 2007, The University of Pennsylvania Health System purchased Graduate

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[24]City Avenue Hospital to Close May 1, Philadelphia Business Journal (2000), https://www.bizjournals.com/philadelphia/stories/2000/01/24/daily18.html (last visited Nov 23, 2020).

[25]John George, Parkview Hospital to Close Philadelphia Business Journal (2003), https://www.bizjournals.com/philadelphia/stories/2003/06/09/daily21.html (last visited Nov 23, 2020).

[26]John George, Albert Einstein to buy Elkins Park Hospital Philadelphia Business Journal (2003), https://www.bizjournals.com/philadelphia/stories/2003/09/01/newscolumn3.html (last visited Nov 23, 2020).

[27] *Id.*

[28]Harold Brubaker, Jefferson would shut Elkins Park ER under its purchase plans for Einstein Healthcare Network The Philadelphia Inquirer (2020), https://www.inquirer.com/business/health/jefferson-einstein-ftc-antitrust-hearing-plan-elkins-park-philadelphia-20200930.html (last visited Nov 23, 2020).

[29] *Id.* The preliminary injunction in this case was recently denied, which likely means the merger will be allowed to proceed.

[30]John George, MCP Hospital to be Shut Down Philadelphia Business Journal (2003), https://www.bizjournals.com/philadelphia/stories/2003/12/15/daily24.html (last visited Nov 23, 2020).

[31] *Id.*

Hospital (UPHS)[32]. UPHS converted the hospital into a rehabilitation facility[33]. In June of 2007, Tenet sold Roxborough Memorial Hospital to Solis healthcare LLC for $25 million[34]. Prime Healthcare Services now owns Roxborough Memorial Hospital[35]. In January of 2018, Tenet sold Hahnemann University Hospital, St. Christopher's Hospital for Children, and all other Philadelphia assets for $170 million to the American Academic Health System[36]. In the twelve months ending in June 30, 2018, Tenet's Philadelphia assets operated at a loss of about $15 million[37]. In September of 2019, Hahnemann University Hospital, with 495 beds closed[38].

C. Competition in Philadelphia today

Eight of AHERF's former hospitals are located in Philadelphia; of these, four hospitals have closed and Elkins Park Hospital might close soon. AHERF's bankruptcy has led to Tenet acquiring their former Philadelphia holdings. Tenet has since completely left the Philadelhpia market, and the remaining four hospitals have been

[32]The University of Pennsylvania Health System Agrees to Purchase Graduate Hospital from Tenet Healthcare Corporation – PR News, Penn Medicine News (2007), https://www.pennmedicine.org/news/news-releases/2007/january/the-university-of-pennsylvania (last visited Nov 23, 2020).

[33] *Id.*

[34]Harold Brubaker, Roxborough Memorial Hospital Has New Owner (2012), The Philadelphia Inquirer (2012), https://www.inquirer.com/philly/business/20120223_Roxborough_Memorial_Hospital_has_new_owner.html (last visited Nov 23, 2020).

[35] *Id.*

[36]John George, Tenet Sells Its Last Two Philadelphia Hospitals For $170M Philadelphia Business Journal (2018), https://www.bizjournals.com/philadelphia/news/2018/01/11/tenet-completes-sale-of-its-last-two-philadelphia.html (last visited Nov 23, 2020).

[37] *Id.*

[38]Steve Twedt, Philadelphia hospital, once part of Allegheny network's expansion plans, set to close Pittsburgh Post-Gazette (2019), https://www.post-gazette.com/business/healthcare-business/2019/07/28/Hahnemann-AHERF-Allegheny-Abdelhak-Sherif-bankruptcy-Drexel/stories/201907240015 (last visited Nov 23, 2020).

disbursed to four seperate hospital systems. Since the remaining four hospitals are all owned by separate hospital systems in a fiercely competitive market, it is unlikely AHERF's bankruptcy has led to any hospital systems gaining a significant increase in market share. Today, there are four hospitals systems in Philadelphia with over 1,000 beds, and 20 hospital systems[39]. AHERF and Tenet's exit from Philadelphia, involved the removal of a major competitor who may have had procompetitive effects. However, the Philadelphia market was oversaturated with no single healthcare provider dominating. Therefore, it is unlikely AHERF and Tenet's exit had a meaningful effect on healthcare competition in the region.

D. Pittsburgh competition after AHERF's bankruptcy

At the time of AHERF's bankruptcy, the University of Pittsburgh Medical Center (UPMC) was the dominant provider of healthcare services[40]. If left unchecked, insurance companies who serve the Pittsburgh region would be required to spend significantly more on UPMC's reimbursement rates. To prevent this, Highmark, for some time, attempted to weaken UPMC's market position by supporting their primary competitor, West Penn.

After the collapse of AHERF, West Penn Allegheny Health System purchased, and merged with, AHERF's hospitals in the Pittsburgh region[41]. This purchase was

[39]Sharon Oliver, Largest Health Systems and Hospitals in the Philadelphia Region Philadelphia Business Journal (2017), https://www.bizjournals.com/philadelphia/subscriber-only/2017/11/24/list-of-philadelphias-largest-health.html (last visited Nov 23, 2020).

[40] *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 92 (3d Cir. 2010)

[41]Lawton R Burns et al., The Fall Of The House Of AHERF: The Allegheny Bankruptcy 36, (2000).

funded by a $125 million loan from Highmark to keep UPMC from increasing their market share in Pittsburgh[42]. In 2002, AHS received a $42 million grant from Highmark[43]. In 2013, Highmark, purchased West Penn, making Highmark one of the largest private integrated healthcare systems with insurance and hospital operations[44].

E. AHERF's former hospitals critical role in preserving competition

In 2010, West Penn sued UPMC and Highmark[45]. At the time, UPMC and West Penn controlled 55% and 23% of the market share for hospital services in Allegheny County respectively[46]. Highmark has controlled between 60% to 80% of the insurance market since 2000[47]. UPMCs' health insurance plan is Highmark's main competitor[48] Since AHS was formed, UPMC has opposed AHS, dating back to AHS' acquisition of AHERF's hospitals[49].

It is likely West Penn's acquisition of AHERF's Pittsburgh assets has increased competition in the Pittsburgh region. UPMC, AHN, and WVU Medicine had $8 billion, $3.4 billion, and $2.8 billion net patient revenue in 2019 respectively[50]. There is also a

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42 *Id.*
43 *Id.*
44 Melanie Evans, Highmark completes West Penn deal, announces new system Modern Healthcare (2013), https://www.modernhealthcare.com/article/20130429/NEWS/304299948/highmark-completes-west-penn-deal-announces-new-system (last visited Nov 23, 2020).
45 *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 91 (3d Cir. 2010).
46 *Id.*
47 *Id* at 92.
48 *Id* at 92-93.
49 *Id.*
50 Ethan Lott, Largest Pittsburgh-area Health Systems Pittsburgh Business Times (2020), https://www.bizjournals.com/pittsburgh/subscriber-only/2020/11/06/largest-pittsburgh-area-health-systems.html (last visited Nov 23, 2020).

significant amount of smaller hospitals with revenue under $1 billion[51]. Had West Penn not acquired AHERF's Pittsburgh hospitals, UPMC would have enjoyed a near monopoly on the Pittsburgh market, since WVU Medicine had not yet been established in the Pittsburgh market at the time of AHERF's bankruptcy[52]. West Penn's acquisition of AHERF was the only way to maintain meaningful competition in the Pittsburgh market[53]. For several years, Highmark and UPMC worked together to increase their own revenue, but this ended in 2007[54]. During the time Highmark and UPMC conspired, we see what would have happened had AHERF's hospitals closed rather than have been sold to West Penn. After the conspiracy was formed, UMPC and Highmark collectively made $943 million more in net income in one year from higher insurance premiums then before the conspiracy[55]. Six years later, Highmrk acquired West Penn, and began competing with UPMC with AHERF's former hospitals.

IV. Morehead Memorial Hospital

Morehead Memorial Hospital's bankruptcy and acquisition was evaluated since it is representative of rural hospitals. Many rural hospitals are facing financial difficulties and are being acquired by larger hospital systems like Morehead was. Morehead demonstrates how rural hospitals with few options can use chapter 11 bankruptcy to be acquired by a larger hospital system.

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[51] *Id.*
[52] *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 92 (3d Cir. 2010).
[53] *Id.*
[54] *Id* at 94.
[55] *Id* at 95.

Morehead is located in rural North Carolina, and has faced financial difficulties for years before filing for bankruptcy. To avoid closing, Morehead was sold to the University of North Carolina Healthcare System (UNCHCS) after it filed for chapter 11 bankruptcy. Since Moreheard, and now UNCHS, owned the only hospital in this region, it is unlikely the region will be affected by the purchase. However, UNCHCS might use the acquisition of this hospital to strengthen its negotiating power with insurance companies for all of their hospitals.

A. Facts surrounding Morehead's bankruptcy

Morehead is a 108-bed hospital in Eden, North Carolina[56]. Morehead serves a population of about 20,000 and owns four of the seven healthcare facilities in its local market[57]. At the time of filing for chapter 11 bankruptcy, Morehead owed about $41 million and tens of millions in an underfunded pension plan [58]. In the four year period before filing for bankruptcy, Morehead's annual net revenue decreased by about $15 million[59]. From January 2017 to August 2017, Morehead operated at a net loss of about $2.5 million on a total net revenue of $49 million[60]. Morehead was purchased by UNCHCS in January 2018[61]. As part of the deal, UNCHCS agreed to pay $11.5 million, assumed $2 million in future commitments towards administrative expenses and paid

[56]*In re Morehead Memorial Hospital*, No. 17-107753 (2018).
[57] *Id* at 3-4.
[58] *Id* at 4-5.
[59] *Id* at 5.
[60] *Id.*
[61] *Id* at 7.

leave, to spend $20 million on the hospital over the three years after the merger, and several other provisions[62].

B. Analysis of the competitive effects of Morehead's bankruptcy

If Morehead was not purchased by UNCHCS, the hospital would have had three possible outcomes. First, the hospital may convert its bankruptcy case to liquidation under chapter 7[63]. This would entail the closing of Morehead. Second, Morehead may attempt to find a different offer[64]. It is too difficult to speculate how this would affect competition in the area to examine this hypothetical outcome. Lastly, Morehead's Chapter 11 case may have been dismissed which would likely result in the hospital's closure[65].

Because of the rural nature of Eden, with an estimated population of 14,886 in 2019, it is unlikely the region can support hospital competition[66]. In many instances, rural areas do not have the population to support more than one hospital. Since there is only one hospital in Eden, whoever owns it will have significant control over the local market. Anticompetitive effects from this may arise when hospital systems demand uniform prices set across all hospitals in order for insurance companies to gain access to certain markets. For example, Sutter Health was sued on the basis of requiring insurance providers to pay the same high prices in competitive areas as they would pay

[62] *Id* a 8-9.
[63] *Id* at 40.
[64] *Id.*
[65] *Id* at 41.
[66]QuickFacts Eden city, North Carolina, https://www.census.gov/quickfacts/fact/table/edencitynorthcarolina/BZA210218

in the areas they had market dominance in[67]. There is nothing to indicate UNCHCS has or is doing this; however, it is very hard to prove a hospital is abusing their market power like this.

Private Alternatives

If a healthcare provider does not wish to declare bankruptcy, there are many private alternatives which may affect market competition. This section will examine the following three alternatives and a merger. Debt is a great private alternative but will not be examined since insolvent hospitals are likely already in significant debt and have likely exhausted this option.

First, mergers and acquisitions allow for the sale or acquisition of the hospital to another entity who will assume legal responsibility for the entity's debts unless the entity was purchased in bankruptcy. This may decrease market competition; however, the F.T.C. may challenge a merger or acquisition on the ground it is anticompetitive, unless there is a Certificates of public advantage (COPA). COPAs significantly decrease market competition but may not always result in anticompetitive effects. The failing firm defense allows a firm to merge or acquire a failing firm if three requirements are met. The defense protects against anticompetitive claims the merger or acquisition should be blocked.

Second, insurance companies may keep hospitals solvent. If a hospital is considering bankruptcy or acquisition which would increase the dominate provider’s market share, the insurance company would pay more money in claims. Therefore, it

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[67] *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2020 WL 4368221, at *1 (N.D. Cal. July 30, 2020)

may make fiscal sense for an insurance company to support a struggling hospital and frustrate market consolidation attempts to keep rates low.

Third, private equity may purchase an interest in a healthcare provider. This may be a great way to repay debt and avoid insolvency or bankruptcy. In some instances, private equity firms are willing to purchase a minority interest in the healthcare provider. Minority investments protect current market share. However, private equity firms may purchase several healthcare providers in a market which may be anticompetitive.

Fourth, Sutter's acquisition of Summit is examined. Summit was insolvent with serious financial issues when Sutter offered to acquire Summit. California objected; however, the court allowed the merger on the basis California failed to prove its prima facie case and Sutter had proved the failing firm defense due to Summit's dire financial situation.

In 2008, a study by the FTC showed the merger created significant anticompetitive effects. Summit was one of Sutter's hospitals biggest competitors in this market and once merged, Sutter was able to significantly raise prices. Sutter is currently being sued on the basis of allegedly using their significant market power in several regions to force insurers to pay high insurance rates for all Sutter hospitals.

I. Mergers and Acquisitions

Mergers and Acquisitions may be a great private alternative, but may have significant anticompetitive effects. Hospitals that are not part of a network and are left alone, are typically financially stressed and potential buyers are not as interested as they would be for hospital systems[68]. However, hospitals that are facing financial difficulty may still be acquired[69]. Mergers and acquisitions are viewed by hospital leaders as a way to increase their market strength[70]. The FTC or the state in which the hospital(s) are located may oppose the transaction on the basis of its anticompetitive effects. Even if the acquiring hospital does not have any market share in the purchasing market, the acquisition may still be challenged on anticompetitive grounds. This is because owning a significant amount of market share in a market can allow a hospital to leverage their significant market power to charge higher rates.

A. COPA's

COPAs allows a two hospitals to merge without federal intervention if they receive state approval[71]. Since COPAs provide immunity from federal agencies, there is nothing the federal government can do to stop a COPA merger. Some states have especially weak COPAs. For example, in Texas, after two hospitals merge, they can rescind the COPA agreement after giving 30 days notice[72]. COPAs, like the one in Texas, are likely to result in increased mergers and acquisitions, especially by hospitals

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68 Troubled Transactions: Why There's Still Hope for Financially Struggling Hospitals, Becker's Hospital Review (2014), https://www.beckershospitalreview.com/hospital-transactions-and-valuation/troubled-transactions-why-there-s-still-hope-for-financially-struggling-hospitals.html (last visited Nov 23, 2020).
69 Id.
70 Id.
71Tara Bannow, Beyond the Byline: Texas COPA law may pave the way for more hospital M&A - Transcript Modern Healthcare (2020), https://www.modernhealthcare.com/news/beyond-byline-texas-copa-law-may-pave-way-more-hospital-ma-transcript (last visited Nov 24, 2020).
72 Id.

that would have been challenged by the F.T.C.[73]. These mergers and acquisitions are very likely to increase provider market share, especially since they target mergers and acquisitions the F.T.C. would have attempted to stop.

Supporters of COPAs may argue states can use COPAs to regulate hospital mergers and attempt to avoid increased costs, decreased access, and lower quality of care[74]. Hospitals often argue COPAs are needed to whether financial difficulties[75]. Struggling rural hospitals may benefit from COPAs if a state allows the acquisition of a struggling hospital by a larger health network which is better suited to care for the local population's health[76]. States may have a successful COPA merger where costs and quality improve; however, to do so, a long term commitment to enforcing the COPA and studying the effects of the merger is required[77]. The requirements of a COPA and their effectiveness will vary from state-to-state. If states use COPAs properly they can help avoid hospital insolvencies which will increase market consolidation but without the negative effects of decreased competition[78].

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[73] *Id.*
[74]Erin C. Fuse Brown, Hospital Mergers and Public Accountability: Tennessee and Virginia Employ a Certificate of Public Advantage Georgia State University College of Law (2018) at 4,
https://poseidon01.ssrn.com/delivery.php?ID=223117004126124093069071117095008018056013034051087067098002122113090070068015004006012058017121015012035002006089105123124114039069054051084095095121125101108067024041095124101070113124084093119076117095104081010084011085113118116019118080017004070 (last visited Dec 18, 2020).
[75] *Id*.
[76] *Id*.
[77] *Id* at 5.
[78] *Id* at 4-5.

B. The Failing Firm Defense

The failing firm defense decreases hospital competition. The defense allows hospitals to circumvent §7 of the Clayton Act which bars mergers and acquisitions which will significantly reduce competition[79]. The failing firm defense allows a firm to merge with or acquire another firm if one firm is failing, even if it will have an anticompetitive effect. The failing firm defense exists on the theory that it is less harmful to allow a firm to significantly increase its market share through the acquisition of the failing firm, than to allow the failing firm to go bankrupt and possibly end it's operations[80].

The horizontal merger guidelines require three prongs to be classified as a failing firm[81]. "(1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger"[82].

The failing firm defense allows for a merger which may significantly increase the purchasing hospital's market share which allows the now consolidated hospital to raise

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[79] 15 U.S.C.A. § 18 (West).
[80] Failing Firm Defense, Practical Law Practice Note 4-569-9166.
[81] Horizontal Merger Guidelines (08/19/2010).
[82] *Id.*

prices and avoid bankruptcy or closure[83]. It does increase the efficiency in which the hospital may operate; however, these savings are not usually passed onto consumers[84].

The FTC stated in May they will continue to apply the failing firm defense test in the guidelines and will still require the same level of substantiation that was required before Covid-19[85]. However, two months later in June, Ian Conner stated the FTC may be more receptive to the failing firm defense in light of Covid-19[86]. The DOJ has also acknowledged in light of Covid-19 some mergers and acquisitions must occur for firms to survive[87]. A large wave of cases will likely claim the defense in the near future[88]. This expected increase is consistent with the financial difficulties hospitals are experiencing and the frequency of hospital consolidations over the past several decades.

C. State Approval for Acquiring Nonprofit Hospitals

Many hospitals are nonprofit entities which require the approval of the state Attorney General to merge. Traditionally, it was expected the state would approve the merger or acquisition; however, over the past decade, Attorney Generals have been

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[83] Ashley J. Austin, *Food for Thought: The Efficiencies Achieved by Trimming an Industry at Overcapacity Through Mergers vs. Chapter 11 Reorganizations*, 25 Emory Bankr. Dev. J. 147, 186 (2008).

[84] *Id.*

[85]Ian Conner, On "Failing" Firms - and Miraculous Recoveries Federal Trade Commission (2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

[86] Michael Callahan & et al., COVID-19 May Lower Bar For Distressed M&A Defenses (2020) at 3, https://s3.amazonaws.com/assets.production.proskauer/uploads/1d61f60dadd752c11d92eb62a6dc27bc.pdf.

[87] *Id* at 5.

[88] *Id*.

more skeptical[89]. It is difficult to formulate a single specific nation-wide standard, since states have very different requirements and limitations for mergers[90]. Usually, an Attorney General will require a closer examination when a for-profit acquires a non-profit, than when a non-profit acquires another non-profit[91]. Often, this is to ensure the vulnerable populations the non-profit serves will be protected and important community programs and services will survive under the new entity[92]. State review of a for-profit acquiring a non-profit will often involve an examination of whether the for-profit will honor the non-profit's charter(s)[93]. Political issues, such as reproductive issues, may also block the merger and must be considered[94]. The state is more likely to look favorably on an acquiring entity which is structured to have community members on its board[95]. Lastly, there are many other factors an Attorney General might consider.

II. Insurance Companies

Insurance companies have an interest in avoiding increased provider consolidation. If a hospital is attempting to increase their market share through the acquisition of a hospital or through a hospital's failure, the hospital will be able to charge patients and insurance providers more money. Insurance providers have an incentive to

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89 Uncertain State Approval a Growing Concern for For-Profit, Non-Profit Healthcare Transactions, Becker's Hospital Review (2012), https://www.beckershospitalreview.com/hospital-transactions-and-valuation/uncertain-state-approval-a-growing-concern-for-for-profit-non-profit-healthcare-transactions.html (last visited Dec 13, 2020).

90 Id.

91 Id.

92 *Id*.

93 *Id*.

94 Id.

95 *Id*.

keep the market competitive to avoid this. Insurance companies can try to keep the market competitive through increasing payments, providing loans, or grants to struggling hospitals. When insurance companies keep struggling hospitals afloat, they maintain the status quo and prevent other hospitals from dominating the market[96].

III. Private Equity

Private equity purchases are a great way for hospitals to restructure or eliminate debt. From 2010 to 2020, private equity firms spent about $340 billion acquiring various healthcare-related businesses across the world[97]. Private equity allows hospitals to sell a minority or majority part of their company, rather than take on debt[98]. It is unlikely private equity investments in hospitals have an anticompetitive effect, unless the private equity firm is attempting to form a network of healthcare providers in a concentrated area. The resources provided by private equity firms usually helps to maintain competition since it reduces the need of the healthcare provider to sell its assets or merge with another hospital because of financial hardship.

It should be noted while private equity's acquisition may not be anticompetitive, it may have effects similar to what you would see if the acquisition was anticompetitive. Specifically, the acquisition often staddels the hospital with a significant amount of

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[96] See *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, (3d Cir. 2010).
[97] Gretchen Morgenson & Emmanuelle Saliba, Private equity firms now control many hospitals, ERs and nursing homes. Is it good for health care? NBCNews.com (2020), https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161 (last visited Nov 24, 2020).
[98] See generally, Emma Court, Medical practices have become a hot investment - are profits being put ahead of patients? MarketWatch (2018), https://www.marketwatch.com/story/doctors-are-being-bought-up-by-private-equity-and-its-your-health-on-the-line-2018-06-08 (last visited Nov 24, 2020).

debt[99]. Private equity firms also cut spending[100]. This means, when a private equity firm acquires a hospital, the quality of care significantly declines[101].

IV. California v. Sutter Health System, Alta Bates Medical Center, and Summit Medical Center

This paper will now examine the merger between Sutter Health System and Summit Medical Center. The case was chosen for two reasons. First, this case was chosen so the effects of a merger where the defendant successfully proved the failing firm defense can be analysed. Second, the effects of this case led to a significant change in the FTC's enforcement of antitrust laws against healthcare mergers. From this case we see how a hospital can abuse increased market share created by the failing firm defense and the anticompetitive effects created by the defense.

A. The facts and reasons for allowing the merger

The defendants are located in California's East Bay, which had at least twenty hospitals[102]. Sutter operates twenty-six hospitals in Northern California, with six in the Bay Area[103]. Summit operates five entities, one of which is a hospital[104]. The Bay Area has large, well-organized, and competitive Independent Practice Associations[105]. The

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[99]Gretchen Morgenson & Emmanuelle Saliba, Private equity firms now control many hospitals, ERs and nursing homes. Is it good for health care? NBCNews.com (2020), https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161 (last visited Nov 24, 2020).

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1060

[103] *Id.*

[104] *Id.*

[105] *Id* at 163.

Court found the plaintiff failed to establish its prima facie case and the defendant successfully proved the failing firm defense in 2000[106].

Summit began failing and experiencing operating losses following the enactment of the Balanced Budget Act, which reduced Medicare payments to hospitals[107]. Medicare accounted for 53.1% and Medi-Cal accounted for 21% of Summits revenue after excluding charity care[108]. It is estimated Summit's revenue decreased by at least $52.8 million in the three fiscal years between 1999 to 2002 and has $68.7 million in long term debt, which it was out of compliance with, and will need to spend about $109.7 million to upgrade its facilities over the coming years[109]. Summit was unable to pay its bills and some suppliers had started to require cash-on-delivery payment[110]. The court held the defendant was insolvent due to the high level of debt, the hospital was operating at a loss and faced a serious risk of business failure.[111] Without an alternative buyer or merger and since bankruptcy would likely lead to liquidation, the court found the defendants had successfully proved the failing firm defense[112].

B. Review of the effects of the merger in 2008

By 2008, the merger had led to a significant price increase above the average regional price increases[113]. By 2008, Summit had increased prices by the largest

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[106] *Id* at 1081.
[107] *Id* at 1064.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1067.
[111] *Id* at 1083.
[112] *Id.*
[113] *Id* at 20.

amount of any comparable hospital in California[114]. Alta Bates had increased prices by between 10.2% to 20.7% and Summit had increased prices by between 29% to 79%, depending on the insurer[115]. When compared to other similar hospitals in California, insurers reported Summit's post-merger price increase to be between the 95th and 99th percentile of price change increases[116]. Alta Bates post-merger price increase was standard when compared to other similar hospitals in California[117]. The difference in price increases is likely attributed to the fact that before the merger, Alta Bates had constrained Summit's prices since it was a large provider to commercial payers[118]. After the merger, this constraint dissolved and Summit was able to raise prices[119]. Alta Bates' prices were still constrained by other hospitals[120]. It is unlikely this price change is because of a different reason, because after examining price increases before the merger, Summit and Alta Bates' price increases were statistically indistinguishable from other similar hospitals in California[121]. It should be noted, that this price increase was also not linked to Summit's failing financial situation, since it had not adjusted its prices prior to the merger in a statistically significant way[122].

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[114] Steven Tenn, The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction 1, (2008), https://www.ftc.gov/sites/default/files/documents/reports/price-effects-hospital-mergers%C2%A0-case-study-sutter-summit-transaction/wp293_0.pdf.
[115] *Id* at 19.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 20.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 21.
[122] *Id.*

C. Sidibe v. Sutter Health litigation in 2020

Sutter was sued for alleged anticompetitive practices[123]. Sutter allegedly used its market power in seven Northern California markets to force insurers in four other geographic markets to accept more favorable terms[124]. This effectively allowed Sutter to leverage its dominance in certain markets to force insurers to pay high prices in all areas Sutter operated. This increased market share was caused in part by Summit Medical Center's acquisition.

Covid-19's Lasting Effect On Hospital Insolvency and Competition

This paper will now examine what the future of healthcare insolvency and its connection to competition will look like in the future. This paper will do so in five parts. First, it will discuss private equity. Second, the failing firm defense will be examined. Third, chapter 11 bankruptcy's future effect on competition will be explored. Fourth, the emergence of telehealth will be discussed. Fifth, the CARES Act will be examined.

First, private equity investments in healthcare providers have increased significantly over the past several years, but are currently slowed due to Covid-19. Once Covid-19 has passed, private equity investments are likely to increase significantly and will be able to purchase equity at a discounted price. This will provide a lifeline to hospitals and reduce changes in market share by current hospitals; however, private equity may also create large hospital networks with anticompetitive effects too.

[123] *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2020 WL 4368221, at *1 (N.D. Cal. July 30, 2020).
[124] *Id.*

Second, the failing firm defense will likely be increasingly used in mergers and acquisitions. Covid-19 has significantly harmed many hospital’s finances. As a result, it is likely many hospitals will become insolvent in the future. This may provide for an opportunity for hospitals to significantly increase their market share when it would otherwise have been blocked by the F.T.C.

Third, it is likely chapter 11 bankruptcy will become more common among hospitals in the future. Before Covid-19, many hospitals were in dire financial situations and Covid-19 has made their finances significantly worse. Furthermore, many of the hospitals facing bankruptcy are not likely to be acquired. Private equity funds leaving the market may also harm many hospitals' finances.

Fourth, telehealth has partially stabilized hospitals' finances during Covid-19. Telehealth may continue to be frequently used in the future, which would provide much needed money to hospitals and retain current regional competition. Telehealth providers may increase in popularity in the future and begin to seriously compete with hospitals for market share.

Fifth, the CARES Act has provided significant funds to hospitals. These funds have helped many hospitals to avoid insolvency. However, Congress has had difficulty passing additional stimulus packages, and without more money, many hospitals are likely to become insolvent in the future.

I. Private Equity

Over the past decade, about $340 billion from private equity firms has entered the healthcare market in the form of investments or purchases[125]. However, investments from private equity firms have been less frequent since Covid-19[126]. For example, in the second quarter of 2020, private equity healthcare deals were at about one-third of what they were at in 2019[127]. It is unclear whether this trend will continue once Covid-19 is no longer a concern. In the near term, this will deprive hospitals of an important source of financing and one of the few ways to sell ownership in hospitals. This will force hospitals to look to other sources of debt. In the mid-term, it is likely private equity will significantly increase investments in hospitals. Since many hospitals have suffered significant financial harm, private equity may be able to buy hospitals at a discount in bankruptcy proceedings. This may lead to anticompetitive effects if private equity purchases with the intent to form a monopoly. Private equity will likely be able to form large healthcare networks across the country at a discounted price over the next several years.

II. Failing Firm Defense

The failing firm defense will likely be frequently used in the future as a means to create very large health providers. Before Covid-19, the Congressional Budget Office

[125]Gretchen Morgenson & Emmanuelle Saliba, Private equity firms now control many hospitals, ERs and nursing homes. Is it good for health care? NBCNews.com (2020), https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161 (last visited Nov 24, 2020).
[126]Tara Bannow, Private equity investment in healthcare slows Modern Healthcare (2020), https://www.modernhealthcare.com/providers/private-equity-investment-healthcare-slows (last visited Nov 24, 2020).
[127] *Id.*

projected 40% to 50% of hospitals would have negative margins by 2025[128]. From March 1, 2020 to June 30, 2020, the American Hospital Association (AHA) estimates hospitals and healthcare systems lost $202.6 billion[129]. In the second quarter of 2020, 14 acquisitions occurred, in comparison, the second quarter between 2016-2019 had seen between 19 to 31 mergers[130]. Nevertheless, hospital consolidation is likely to increase after Covid-19[131]. Furthermore, Covid-19 may present a rare opportunity for major hospital networks to merge. Since many hospitals are suffering and will continue to suffer significant financial harm, they are far more likely to satisfy the failing firm requirements. If this happens, major hospital networks may be able to merge with failing hospitals in areas they already have significant market share. If this happens, this will have disastrous effects for healthcare competition in many markets.

III. Chapter 11 Bankruptcy

Before Covid-19, healthcare providers were already in bad financial situations[132]. In the past ten years, over 120 rural hospitals have closed[133]. For years before

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[128]Hospitals and Health Systems Face Unprecedented Financial Pressures Due to Covid-19, American Hospital Association (2020), https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due (last visited Nov 25, 2020).

[129] *Id.*

[130]Rich Daly, More hospital consolidation is expected post-pandemic Healthcare Financial Management Association (2020), https://www.hfma.org/topics/news/2020/08/more-hospital-consolidation-is-expected-post-pandemic.html (last visited Nov 25, 2020).

[131] *Id.*

[132]Chad Mulvany, Covid-19 exacerbates bankruptcy for at-risk hospitals Healthcare Financial Management Association (2020), https://www.hfma.org/topics/coronavirus/covid-19-exacerbates-bankruptcy-for-at-risk-hospitals.html (last visited Nov 24, 2020).

[133]Mark Taylor, The coronavirus is devastating U.S. hospitals, which will lose $200 billion in revenue by the end of June MarketWatch (2020),

Covid-19, hospitals have been in upheaval as reimbursement rates have fell, cost of care has increased, and rural populations have declined[134].

Before Covid-19, about 20% of hospitals faced a material financial risk[135]. Now, nearly two-thirds of hospitals face a material financial risk[136]. From March 2020 to June 2020, hospitals lost an estimated $202.6 billion[137]. The bottom 25% to 30% of hospitals have very few options to address this issue[138]. Even if hospitals are going to be acquired more frequently in the future, it is unlikely this bottom 25% 30% of hospitals will be targeted for acquisition[139]. This means, if the hospitals declare bankruptcy, they are significantly more likely to close than to be acquired.

The coming bankruptcies are likely going to result in further consolidation in healthcare[140]. Health industry experts expect many hospitals to either file for bankruptcy

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https://www.marketwatch.com/story/the-coronavirus-is-devastating-us-hospitals-which-will-lose-200-billion-in-revenue-by-the-end-of-june-2020-06-11 (last visited Nov 25, 2020).

[134]Alex Wolf, Hospital Bankruptcy Surge Looms as Virus Rages, Stimulus Lapses Bloomberg Law (2020), https://news.bloomberglaw.com/bankruptcy-law/hospital-bankruptcy-surge-looms-as-virus-rages-stimulus-lapses (last visited Nov 25, 2020).

[135]Lauren Coleman-Lochner, Shaky U.S. Hospitals Risk Bankruptcy in latest Covid Wave Bloomberg (2020), https://www.bloomberg.com/news/articles/2020-10-14/shaky-u-s-hospitals-risk-bankruptcy-in-latest-covid-wave (last visited Nov 25, 2020).

[136] *Id.*

[137]Hospitals and Health Systems Face Unprecedented Financial Pressures Due to Covid-19, American Hospital Association (2020), https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due (last visited Nov 25, 2020).

[138] *Id.*

[139] *Id.*

[140]Chad Mulvany, Covid-19 exacerbates bankruptcy for at-risk hospitals Healthcare Financial Management Association (2020), https://www.hfma.org/topics/coronavirus/covid-19-exacerbates-bankruptcy-for-at-risk-hospitals.html (last visited Nov 24, 2020).

or consolidate over the next few months[141]. As a result of Covid-19, many hospital executives are looking to merge with or acquire other hospitals[142]. The threat of bankruptcy and insolvency from hospitals poor financial situations will force hospitals to consolidate faster than they were before Covid-19[143]. Furthermore, since private equity funds have dried up recently, hospitals are now deprived from an important source of financing which could be used to postpone or avoid bankruptcy.

IV. Telehealth

Covid-19 has increased the use of telehealth[144]. Although, it is unclear if telehealth will remain frequently used after Covid-19; it likely depends on whether payers will continue to reimburse for telehealth at its current levels[145]. This increased use of telehealth helps to partially offset the financial harm and the risk of bankruptcy

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[141]Christina Farr, Hospitals could struggle - and more will go bankrupt - until they get patients back in the door CNBC (2020), https://www.cnbc.com/2020/06/07/hospitals-will-struggle-until-they-get-patients-back-in-the-door.html (last visited Nov 25, 2020).

[142]Rita Numerof, Covid-Induced Hospital Consolidation: What Are The Impacts On Consumers, And Potentially The President Forbes (2020), https://www.forbes.com/sites/ritanumerof/2020/11/11/covid-induced-hospital-consolidation-what-are-the-impacts-on-consumers-and-potentially-the-president/?sh=9b094334da07 (last visited Nov 25, 2020).

[143]Frank Diamond, Join or Die: How Covid-19 Forces More Healthcare Consolidation Infection Control Today (2020), https://www.infectioncontroltoday.com/view/join-or-die-how-covid-19-forces-more-healthcare-consolidation (last visited Nov 25, 2020).

[144]Jeff Lagasse, Telehealth effectively providing revenue stop-gap for U.S. hospitals, finds Fitch Healthcare Finance News (2020), https://www.healthcarefinancenews.com/news/telehealth-effectively-providing-revenue-stop-gap-us-hospitals-finds-fitch (last visited Nov 28, 2020).

[145] *Id.*

from reduced use of healthcare services since Covid-19 started[146]. It is unclear if telehealth providers will become a dominant healthcare provider. If they do, telehealth providers may be able to increase competition throughout the whole country.

V. Government Rescue Packages

The government did provide some relief for the economy and hospitals when it passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27th, 2020. The CARES Act distributed $175 billion to healthcare providers[147]. Of this, $100 billion is allocated to increased reimbursements for healthcare providers who have lost revenue or incurred expenses related to Covid-19[148]. The healthcare providers must also diagnose or test individuals with Covid-19 to apply for access to these funds[149]. Medicare payments are also increased and accelerated hospitals that provide Covid-19 services[150]. Telehealth coverage is also expanded for medicare and private insurance individuals[151]. These funds have provided a critical lifeline to many struggling hospitals, and have helped hospitals remain solvent. However, without future government funds, insolvency for many hospitals remains likely. Multiple attempts to provide additional

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[146] *Id.*
[147] HHS Office of the Secretary & Assistant Secretary for Public Affairs (ASPA), CARES Act Provider Relief Fund HHS.gov (2020), https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html (last visited Dec 18, 2020).
[148] Matthew Gordon, et al., Healthcare Industry Implications of the CARES Act JD Supra (2020), https://www.jdsupra.com/legalnews/healthcare-industry-implications-of-the-55556/ (last visited Dec 15, 2020).
[149] *Id.*
[150] *Id.*
[151] *Id.*

stimulus funds to the economy and healthcare providers have failed. The most recent attempt by Congress involves a bipartisan $908 billion stimulus with $35 billion allocated to healthcare providers[152]. It is unclear if this stimulus package will pass. If hospitals receive additional stimulus funds, many more hospitals may be able to avoid insolvency.

Conclusion

In conclusion, insolvency has a significant effect on hospital competition. Bankruptcy's effect on healthcare competition is circumstantial. Chapter 11 bankruptcy may decrease competition in some instances if a hospital's assets are sold to another hospital who already has significant market power or if the facilities are closed. An example of decreased competition can be found in Morehead Memorial Hospital's acquisition by UNCHCS. Locally the market share did not change but it gave UNCHCS increased market power in the larger market which may be used to bargain for better rates across all of its facilities. Conversely, chapter 11 may be used to support market competition. For example, West Penn purchased several hospitals from AHERF after they declared bankruptcy. West Penn used these hospitals to fiercely compete with the larger UPMC for market share.

The private alternatives focused on in this paper effect on hospital competition are also circumstantial. Hospitals have been aggressively merged and acquired over the past several decades. Mergers and acquisitions protect hospitals facing bankruptcy

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[152] Sarah Hansen, New $908 Billion Bipartisan Stimulus Proposal Released Today-Here's What's In It Forbes (2020), https://www.forbes.com/sites/sarahhansen/2020/12/01/new-908-billion-bipartisan-stimulus-proposal-to-be-released-today-heres-whats-in-it/?sh=2092cbf96f39 (last visited Dec 17, 2020).

by taking control of the hospital's assets and debt. If the hospital is purchased in bankruptcy, then the purchaser does not assume responsibility for the hospital's debt. The FTC or state governments may block the merger on the grounds the merger would significantly decrease market competition. The Supreme Court listed three requirements for the failing firm defense. First, there must be an immediate risk of failure. Second, there must be a low probability of success in bankruptcy. Third, there must not be an alternative viable purchaser. While a merger or acquisition can have positive effects for the two firms, it is likely to decrease market competition. The failing firm defense is especially likely to decrease market competition since it rebuts the prima facie case that proved the merger or acquisition is anticompetitive. Another alternative for hospitals are insurance companies. If the hospital closes or is acquired by another hospital already in the same market, the insurance provider will likely be forced to pay more to the merged entity. Therefore, insurance providers might be willing to support a struggling hospital to keep rates from rising. Third, private equity may provide money in exchange for a stake in, or the entire, hospital. This may lead to anticompetitive effects, but it depends on the private equity firm and its reason for buying a part of the hospital.

Hospital competition and makeup are likely to change significantly in the future. Private equity is likely to significantly increase its purchases in healthcare providers in the coming years. Purchases are temporarily below where they have been in the past. Before Covid-19, the year-over-year investment amount by private equity was constantly increasing and this trend may continue. Additionally, private equity will be able to purchase assets at a significant discount due to the financial harm Covid-19 has caused hospitals. This may decrease hospital competition since many hospital providers will be acquired by a few private equity firms. It is likely that the failing firm defense will be used more frequently. Before Covid-19, many hospitals were suffering from financial issues, and Covid-19 has likely exacerbated this. Now, many more hospitals will satisfy the imminent danger of failure requirements. With this requirement satisfied, hospital mergers might be allowed that would have otherwise been stopped by the FTC or a state government. Since these hospitals will not be stopped from merging, we may see very large hospital networks which dominate many markets emerge over the next few years. Covid-19 has caused the implementation of telehealth across the country. Whether or not this remains will depend on insurance coverage rates. If this trend remains, hospitals might be able to get on better financial footing and we might see the rise of major telehealth providers who will have non-trivial amounts of market power across the country. This would promote competition since a new healthcare provider would enter the market and hospitals would have slightly more revenue. Finally, the future for many hospitals is dependent on government aid. The CARES Act helped hospitals avoid insolvency in the short term; however, without more government aid, the effects of the CARES Act will likely be short lived.

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