2022 Final Exam—Question 2

PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

You are an associate at Gambini & Galloway, a busy firm these days. You and JoAnne Galloway, a partner with whom you work, have met with Dr. Gregory House, the CEO of Providence Healthcare, a long-time firm client. Providence, an integrated healthcare system in Montana, Idaho, and Wyoming, is negotiating to acquire Mid Montana Clinic, PC (MMC), the largest physician group in Missoula, MT, for $36 million in cash. Dr. House reluctantly asked for the meeting at the insistence of his corporate lawyers, who were concerned that the transaction might raise antitrust concerns since Providence operates Providence St. Joseph's (PSJ), the larger of two hospitals in Missoula. Dr. House said that Providence had acquired physician groups in Billings, Cheyenne, and Boise, where it also has hospitals, without any problems and saw no reason why the acquisition of MMC should be any different.

Ms. Galloway promised Dr. House to provide him with a preliminary antitrust risk assessment of the transaction. The corporate lawyers have warned Ms. Galloway that if she thinks there may be an antitrust problem with the transaction, Dr. House will need a rigorously argued (but not necessarily long) memorandum of law to be convinced.

Ms. Galloway does believe that the transaction presents a serious antitrust concern and has asked you to draft the memorandum she will send to Dr. House. Ms. Galloway wants the memorandum to address the risk that the transaction will be subject to an antitrust review by the Federal Trade Commission or state antitrust authorities,[1] the theories of anticompetitive harm that the transaction is likely to present and any defenses to these theories the merging parties may be able to develop, and the likely outcome of any investigation (including any possibility of a consent settlement).

For background, Providence has provided some information and you have researched materials in the public domain. Ms. Galloway asks that the memorandum identify any information that needs to be developed to refine the analysis further, but you should use your common sense and experience where possible to predict what the answers to those questions are likely to be.

The merging parties

Providence is an integrated healthcare system operating in Montana, Idaho, and Wyoming.[2] In the Missoula area, Providence operates Providence St. Joseph's, a vertically integrated healthcare delivery system operating a 220-bed general acute care hospital, eight primary care clinics, and several specialty clinics. Providence St. Joseph's employs 160 physicians in the region, of which 108 are hospitalists and 52 are nonhospital outpatient physicians.[3] Providence St. Joseph's nonhospital outpatient physicians, all of whom work in Providence St. Joseph's primary and

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1 Ms. Galloway knows that the FTC reviews transactions involving medical providers.

2 An integrated healthcare system is comprised of both hospital services and physician services and may also include insurance companies and research and education components.

3 A hospitalist is a dedicated inpatient physician who works exclusively in a hospital. Hospitalists do not treat patients on an outpatient basis. Outpatient physicians treat patients initially outside of a hospital in nonhospital clinics or doctor's offices.

specialty clinics, include 36 adult primary care physicians (PCPs), four pediatricians, eight OB/GYN physicians, and four general surgeons.[4]

St. Mary's Hospital, a 160-bed acute care hospital, operates the only other hospital in the Missoula area. St. Mary's employs 88 physicians, primarily hospitalists and other hospital-based specialists. Its nonhospital outpatient physicians include six adult PCPs but no pediatricians, OB/GYN physicians, or general surgeons.

MMC, a for-profit, physician-owned professional corporation under Montana law, is a multispecialty for-profit physician group in Missoula. MMC operates only in the Missoula area, where it has nine clinics and one ambulatory surgery center. MMC has 43 physicians (all with an ownership interest in MMC), including 23 adult PCPs, six pediatricians, eight OB/GYN physicians, and six general surgeons.[5]

For many years, MMC and St. Mary's have had a referral relationship. MMC is the largest source of referrals for St. Mary's, accounting for almost 60% of St. Mary's inpatient admissions. All MMC physicians have staff privileges in their respective specialties at St. Mary's and a few also have staff privileges at St. Joseph's.[6] MMC and St. Mary's also have professional service agreements under which, for example, MMC general surgeons provide trauma coverage, MMC OB/GYNs provide childbirth coverage, and MMC pediatricians provide emergency pediatric coverage at St. Mary's, without which St. Mary's could not operate.

The following table summarizes the nonhospital outpatient physicians in the greater Missoula area:[7]

Nonhospital Outpatient Physicians in the Missoula Area

Provider	Adult PCP	Pediatricians	OB/GYN	General surgery	Total
Providence St. Joseph's	36	4	8	4	52
St. Mary's	6				6
Mid Montana Clinic (MMC)	23	6	8	6	43
University Doctors, P.C.	6	1			8
Center for Family Medicine	3				3
Baker Family Medicine	1				1
Grant Creek Family Clinic	4	1	0		5
Sole practitioners	2		0		2
	81	12	16	10	120

The contemplated transaction

[4] A description of each of these specialties is given in the appendix if you need it.

[5] To be clear, MMC does not operate any hospital and all MMC's physicians are nonhospital outpatient physicians.

[6] Hospital staff privileges authorize a medical practitioner who is not employed by the hospital to admit patients and provide patient care in the hospital for a specific medical practice.

[7] The Total in the table may be larger than the sum of the numbers in the row because of physicians in the group with specialities other than the four noted.

For several years, both Providence and St. Mary's have indicated an interest (and an increasing willingness to pay) to acquire MMC. After resisting these entreaties, MMC decided earlier this year to put itself up for sale and invited bids from Providence and St. Mary's. Dr. House said that MMC's decision to align itself with a healthcare system containing a hospital was necessary to maintain MMC's long-run financial viability. Dr. House admitted, however, that the due diligence on MMC revealed that MMC revenues increased during each of the prior three years. The due diligence also gave no indication that MMC will not be able to continue to be a profitable business into the foreseeable future as a standalone healthcare provider in Missoula.

Providence's current bid is to buy MMS for $36 million in cash.[8] The acquisition will include all MMC's practice assets, including its clinics and diagnostic imaging equipment. Providence also agrees to continue operating all MMC's facilities and offer employment to all MMC employees, including all MMC physicians.

When questioned by Ms. Galloway, Dr. House said that Providence values nonhospital physician practices (including real estate and other associated assets) in the Missoula area at about $700,000 per physician. This assumes that the physicians in the acquired practice would become Providence employees at closing under a five-year employment agreement. MMC physicians who sign employment agreements would continue to work in their current jobs in their current facilities. However, as Providence employees, they could have hospital staff privileges only at Providence St. Joseph's, and any local referrals they make would have to be to physicians in Providence St. Joseph's hospitals and clinics.

Providence recognizes that not all MMC physicians will wish to become Providence employees. Already two MMC pediatricians have announced that if the deal closes, they will be joining Grant Creek Family Clinic. In addition, one MMC OB/GYN and one MMC general surgeon have announced that they will retire from the practice of medicine once the deal closes. Because the value of the acquisition decreases with each physician that does not join as an employee, Providence has negotiated a purchase price adjustment of $800,000 for every MMC physician who does not become a Providence employee at the closing. Providence will also require conditioning the closing on at least 35 MMC physicians becoming Providence employees. If more than eight MMC physicians do not join as employees, Providence can terminate the purchase agreement. Notably, as with past acquisitions of physician groups, Providence will not seek to impose a noncompetition restriction on a selling MMC physician who does not become an employee.

St. Mary's also bid for MMC. Providence and St. Mary's went through several rounds of bidding, but ultimately St. Mary's could not match the price that Providence was offering to pay.

Transaction rationale and benefits

Although Providence St. Joseph's has the capacity in its physical facilities to serve a larger number of patients, its physicians are operating at capacity. Dr. House stated that for the last three years, Providence St. Joseph's had been trying unsuccessfully to recruit additional pediatricians, OB/GYNs, and general surgeons to expand its hospital and clinics. Recruiting physicians in Missoula is challenging because of the area's geographic location, perceived adverse weather conditions, and the lack of Montana OB/GYN and pediatrics residency programs. If all but the four MMC physicians who have announced other plans join Providence,

[8] It is up to MMC as to how to distribute the purchase to its individual physician-owners.

the MMC acquisition will satisfy Providence St. Joseph's desire for additional physicians. In the event, however, that the acquisition does not include at least two pediatricians, two OB/GYNs, and two general surgeons, Providence will resume its recruitment efforts to make up the shortfall.

When asked whether the transaction offered any benefits in the Missoula area, Dr. House replied that the transaction will benefit patients in at least three distinct ways:

1. Providence St. Joseph obtains rebates from drug manufacturers for drugs used by Medicare and Medicaid patients under the federal "340B program."[9] Under the law, Providence St. Joseph must pass these rebates to its Medicare and Medicaid patients. All MMC's Medicare and Medicaid patients must purchase from commercial pharmacies that do not qualify for the 340B program and consequently pay higher prices for their prescription drugs than patients purchasing from the Providence St. Joseph's pharmacy. After the acquisition, MMC's Medicare and Medicaid patients will be able to purchase their prescription drugs from the Providence St. Joseph pharmacy at the lower price. Providence St. Joseph estimates that this will save MMC patients over $1 million in drug costs.
2. All MMC patients will be able to access the Providence St. Joseph's clinical laboratory services. While Providence St. Joseph's does not charge patients lower fees than the commercial laboratories MMC uses, the turn-around time for testing averages one day less at Providence St. Joseph's because MMC must send its tests to commercial laboratories in Billings, MT, 345 miles away.
3. Providence St. Joseph's can improve patient quality at MMC clinics by (a) embedding behavioral health therapists into MMC's primary care clinics, (b) assisting in enrolling MMC cancer patients in clinical trials outside the Missoula area, and (c) creating an electronic medical record (EMR) system for MMC.

Payers and patients

In 2020, over $809 billion was spent on physician and clinical outpatient services in the United States.[10] Most medical services in the United States are charged on a fee-for-service model. When a patient obtains a medical service, the physician charges a fee for the service. In 2020, however, patients paid out-of-pocket only 7.3% of all fees for physician and nonhospital services, the rest being paid by private and government third-party payers. Commercial insurance companies paid 37.1%, Medicare and Medicaid 34.8%, other government payers 5.3%, and other

[9] Section 340B of the Public Health Service Act requires pharmaceutical manufacturers to enter into an agreement, called a pharmaceutical pricing agreement (PPA), with the HHS Secretary in exchange for having their drugs covered by Medicaid and Medicare Part B. Under the PPA, the manufacturer agrees to provide front-end discounts on covered outpatient drugs purchased by specified providers, called "covered entities," that serve the nation's most vulnerable patient populations. Providence St. Joseph is a covered entity; MMC is not.

[10] Centers for Medicare & Medicaid Services, National Health Expenditures by Type of Service and Source of Funds, CY 1960-2020.

third-party payers 15.5%.[11] In the United States, 54.3% of Americans obtain their health insurance through employer-sponsored commercial insurance plans.[12]

Medicare, Medicaid, and other government payers set the fee providers can charge for their insureds on a "take it or leave it" basis. There are no negotiations with providers. Providers seeking reimbursement under one of these programs can charge no more for a service than the government-set rate. These rates are the same throughout the country and do not vary because of differences in the cost of living or competitive conditions in a specific area. Given the large number of patients on Medicare and Medicaid, almost medical providers accept Medicare and Medicaid patients.

By contrast, commercial insurance companies negotiate with individual providers on the fee the provider will charge for a service provided to a covered patient. Most commercial insurance plans begin to pay a share of an insured's medical expenses each year after the patient has paid a set amount in the insurance contract (the "deductible"). After the patient has paid the deductible, when a provider renders a service, the insurance company pays the bulk of the agreed-upon fee, and the patient is responsible for the remainder of the charge (the "copay"). Most of the 7.3% of nonhospital outpatient services paid by patients are the result of insurance deductibles and copays.

Commercial insurance companies seek to pay medical providers the lowest reimbursement rates they can negotiate. They do this by creating a "network" of providers in a general area. Insurance companies then incentivize their insureds to use "in-network" providers by charging substantially lower copays than for out-of-network providers. As a result, the vast bulk of commercially insured patients obtains their medical services from "in-network" providers. In this way, insurance companies can "deliver" their insureds to in-network providers and increase the providers' utilization rates and market share. Insurance companies then obtain the lowest reimbursement rates by effectively requiring reasonably substitutable providers to bid against each other for an exclusive spot in the insurance company's network.

Two providers are "reasonably substitutable" for inclusion in an instance network if the insurance company's ability to sell its insurance plans to employers is not especially sensitive to which provider is included in the network. Employers, in turn, are sensitive to the demands of their employees as to what providers their employees wish to use. The more an employer's employees demand to use a particular provider, the more likely the employer will only purchase insurance plans that include that provider in the network. As a result, local employers are looking for insurance plans that include "in-network" providers with the medical services and specialties their employees demand and within a reasonable driving distance for their employees. Providers then compete to make themselves attractive to insureds to maximize their bargaining leverage with insurance companies when negotiating for inclusion in the network.

Since most insured patients pay only a small portion of the fees an "in-network" provider charges, patients almost always look first for doctors within their insurance company's network with the medical specialty that meets the patient's health needs. Patients then choose among these "in-network" physicians based on referrals by other doctors, the recommendations of

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[11] *Id*.

[12] Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, Health Insurance Coverage in the United States: 2021 3 (Sept. 2022).

family and friends, professional ranking, location, availability of appointments, and other nonprice factors. In general, while patients are willing to travel considerable distances for specialized complex medical procedures, they are not willing to travel more than 20 miles from home for the types of services provided by adult PCPs, pediatricians, OB/GYNs, or general surgeons if reputable quality "in-network" providers are available within that distance.

Within the Missoula area, insurance companies regard Providence St. Joseph's and St. Mary's as reasonably substitutable hospitals, and insurance companies often require that they bid against each other for an exclusive spot in an insurance company's network for iplans covering Western Montana. Because Providence St. Joseph's negotiates as a package with its clinics, an insurance company that includes Providence St. Joseph's in its network will also include its associated clinics. Conversely, since St. Mary's depends on MMC doctors for inpatient referrals and for various types of medical specialty coverage within the hospital, an insurance company that includes St. Mary's in its network will also include MMC. For example, Blue Cross Blue Shield of Montana, the largest commercial insurance company in Montana, includes St. Mary's and MMC in its network but does not include Providence St. Joseph's. On the other hand, UnitedHealthcare includes Providence St. Joseph's in its network but does not include either St. Mary's or MMC.

Competition in nonhospital outpatient services in and around Missoula

Missoula is Montana's largest city. The Missoula metropolitan statistical area, which comprises Missoula County, is one of three MSAs in Montana. In 2020, the Missoula MSA had a population of 117,922, making it Montana's second-largest MSA behind Billings and ahead of Bozeman. The two hospitals and all nonhospital outpatient clinics in Missoula Country are in the city of Missoula and within three miles of each other.

Outside of Missoula County, the nearest hospital is the 25-bed Superior Community Hospital, almost 60 miles away in Superior, MT. The nearest hospital with over 100 beds is 119-bed St. James Healthcare in Butte, MT, 118 miles from Missoula. To the north, Kalispell, MT, 188 miles from Missoula, has the 124-bed Logan Health Medical Center. The only meaningful nonhospital outpatient services are offered around these hospitals.

Possible concerns about the transaction

When asked about possible opposition to the transaction, Dr. House was notably noncommittal, saying that he would have to think more about this. Dr. House did inquire, however, whether opposition to the transaction would increase the likelihood of an investigation or the chances the deal would be challenged.

APPENDIX

Adult PCP services are provided to patients aged 18 and over by physicians who are board-certified in internal medicine, family medicine, and general practice. Adult PCP services typically include routine medical services in an outpatient or office setting, such as physical exams, basic medical procedures, treatments of common illnesses and injuries, and long-term management of chronic conditions such as diabetes and hypertension.

Pediatric services are primary care services provided by pediatricians to children under the age of 18. Pediatricians receive additional training to treat medical conditions affecting pediatric patients.

OB/GYN services provided by specially trained physicians related to women's reproductive health, pregnancy, and childbirth.

General surgery services are offered by physicians who are board-certified exclusively in general surgery. General surgeons typically perform basic surgical procedures including abdominal surgeries, hernia repair surgeries, gallbladder surgeries, and appendectomies. Specialty surgeons who receive additional training and certification in particular types of procedures beyond the scope of general surgery training do not perform the same set of services as surgeons who are board-certified exclusively in general surgery.

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Fall 2022

PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

Outline

This outline summarizes the analysis of the hypothetical. The issues presented range from easy to spot and analyze to quite complicated. In the time available, no answer could spot, much less analyze, all of the issues. The exams were ranked ordered based on their completeness and analytical persuasiveness. I then applied the law school's curve to assign grades

1. **Questions—**Asks for a draft memorandum of law giving a preliminary risk assessment to the client and addressing the following topics:
    a. the risk that the transaction will be subject to an antitrust review by the Federal Trade Commission or state antitrust authorities,[1]
    b. the theories of anticompetitive harm that the transaction is likely to present
    c. any defenses to these theories the merging parties may be able to develop, *and*
    d. the likely outcome of any investigation (including any possibility of a consent settlement)
    e. identify any information that needs to be developed to refine the analysis further

2. **Initial observations:**
    a. Type of transaction: This transaction is both—
        i. *Horizontal* since both Providence and MMC operate nonhospital outpatient clinics in Missoula, *and*
        ii. *Vertical* since MMC provides both—
            1. Medical staff services to St. Mary's (a hospital-competitor to Providence)
                a. MMC general surgeons provide trauma coverage,
                b. MMC OB/GYNs provide childbirth coverage, and
                c. MMC pediatricians provide emergency pediatric coverage

            (St. Mary's could not operate without these services)
            2. Referrals—accounting for 60% of St. Mary's inpatient admissions (St. Mary's could not operate without these referrals)
    b. Targeted customers
        i. Commercial health insurance companies
        ii. Patient-beneficiaries of commercial health insurance companies
    c. Violates—
        i. *Horizontal*: Section 7 in each medical specialty providing services to each targeted customer class
        ii. *Horizontal*: Section 2 through a merger-to-monopoly in the OB/GYN and general surgery markets
        iii. *Vertical*: Section 7 by foreclosing St. Mary's in—
            1. Referrals
            2. Pediatric staff services in emergency pediatric coverage
            3. OB/GYN staff services in childbirth coverage
            4. General surgery in trauma coverage

[1] The problem states that the FTC reviews transactions involving medical providers.

iv. *Vertical*: Section 2 by monopolizing or attempting to monopolize hospital services in the Missoula metropolitan area

INQUIRY RISK

3. Inquiry risk

a. Summary
   i. Likely to open an investigation or file a complaint
      1. FTC
      2. Montana AG
      3. St. Mary's—private action if FTC and Montana AG fail to block
   ii. Likely to complain to the federal and state antitrust enforcement agencies
      1. St. Mary's
      2. Insurance companies
      3. City of Missoula
      4. Possibly the Montana Department of Health

b. Purchase price $36 million in cash → does not meet the HSR reporting threshold → not HSR reportable[2]

c. BUT the transaction is public: MMC put itself up for sale, Providence and St. Mary's bid, and Providence won the bid

d. St. Mary's will certainly alert the FTC and the Montana Attorney General to the transaction (if it has not done so already), since St. Mary's could not function without MMC's medial staff services and referrals
   i. St. Mary's almost surely will contact their lawyers as soon as they heard that Providence won the bidding for MMC, and St. Mary's lawyers will know enough to contract the FTC and the Montana AG's office.
   ii. Separately, the FTC's investigations and challenges to hospital mergers and hospital acquisition of physician groups are well known in the industry, so St. Mary's would know who to call even without contacting its lawyers.[3]

e. Given that—
   i. Providence and St. Mary's operate the only two hospitals in Missoula
   ii. St. Mary's could not operate without MMC's medical services and referrals, *and*
   iii. Providence and MMC are the two largest operators of nonhospital outpatient clinics and the only operators of outpatient clinical services for OB/GYN and general surgery

   The FTC and the Montana AG's Office will have serious antitrust concerns about the pending acquisition and open a joint investigation into it (with the expectation of blocking the deal)

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[2] A number of students noted that the transaction was not HSR reportable but that the FTC would open an investigation. In a non-HSR reportable transaction, the inquiry analysis must address how the transaction will come to the attention of the agency and why the agency would conclude that it should open an investigation. The most common reason is that the agency will be alerted to the transaction by a complaint from a customer or a competitor (or, in this case, perhaps the city or a state agency) and that the complaint will provide enough information to warrant at least a preliminary investigation of the transaction.

[3] We did not cover these types of FTC challenges in the course, so I do not expect you to know this.

f. Even if St. Mary's does not complain, the Montana AG's office would likely learn about the deal through the Missoula press, Missoula city officials, or the Montana State Department of Health
g. Insurance companies could also complain to the FTC and the Montana AG's office
h. Since the acquisition poses an existential threat to St. Mary's if foreclosed from MMC doctors and referrals, St. Mary's could and probably would bring a private if the FTC or Montana AG's office failed to block the transaction[4]

SUBSTANTIVE RISK—THEORIES OF HARM AND DEFENSES

4. Summary

a. Horizontal problem in—
   i. Adult PCP nonhospital outpatient services in the Missoula area
   ii. Pediatrician nonhospital outpatient services in the Missoula area
   iii. OB/GYN nonhospital outpatient services in the Missoula area
   iv. General surgery nonhospital outpatient services in the Missoula area
b. Vertical foreclosure problem with St. Mary's as the target in—
   i. Referrals
   ii. MMC general surgeons to provide trauma coverage
   iii. MMC OB/GYNs to provide childbirth coverage
   iv. MMC pediatricians to provide emergency pediatric coverage

5. Relevant product markets

a. Summary
   i. Adult PCP nonhospital outpatient services
   ii. Pediatrician nonhospital outpatient services
   iii. OB/GYN nonhospital outpatient services
   iv. General surgery nonhospital outpatient services[5]
b. *Targeted customer markets*:
   i. Commercial medical insurance companies on price
   ii. Patient-beneficiaries of commercial medical insurance companies on copays and medical service quality

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[4] The question asked about the risk that either the FTC or a state AG would investigate, so technically the risk of a private action by St. Mary's was outside the scope of the question. Accordingly, I did not deduct for failing to spot the risk of a private action by St. Mary's.

[5] Some students concluded that the relevant market was nonhospital outpatient physician services. This is not correct. Given the disjoint nature of the four specialties in question, there is very little or no cross-elasticity of demand across specialties (e.g., if a patient needs OB/GYN services, they will not find pediatric services substitutable). Nor is a cluster market appropriate here since the services are not all usually provided in the same place and the supply conditions differ by specialty (remember why ink and toner were not included in the consumable office supplies market in Staples /Office Depot). Finally, since the number of specialties to consider is only four, there is little analytical convenience in creating a cluster market that combines them.

Separately, a number of students concluded that the relevant product market was adult primary care practitioners (PCPs) but failed to identify the other three specialties as relevant product markets. PCPs are medial specialists just as are pediatricians, OB/GYNs, or general surgeons. Notwithstanding the description in the appendix of PCPs as particular type of medical specialist, I suspect that these students thought that PCP was the cluster market that included all of the specialties of interest. Given this possible confusion, I did not deduct for the failure to identify the other specialties as product markets.

Note: Government payers set fees uniformly nationwide on a "take it or leave basis" and so can protect themselves from supracompetitive price increases. While this could be a separate targeted customer market, there would be no anticompetitive harm to a government payer.

c. *Brown Shoe* factors
    i. Each of the four services consists of medical doctors with specialized training and experience in treating a specific class of medical conditions
    ii. Patients demand treatment from specialists in each of these for services when they develop a medical condition in that class
    iii. Specialists in one class are not trained to deliver medical services in another class of medical conditions
d. Hypothetical monopolist test—Use critical loss
    i. The facts describe demand for services in each specialty to be essentially inelastic for each of the two types of targeted customers
        1. Patients with commercial insurance are not sensitive to increases in price (i.e., have inelastic demand)
        2. Health insurance companies are sensitive to patient demand and are not sensitive to (uniform) increases in price
    ii. With inelastic demand, there is essentially no actual loss of customers with the imposition of a uniform SSNIP
    iii. When there is no actual loss, the HMT test is satisfied under a unit critical loss implementation

6. Relevant geographic market—Missoula metropolitan area

a. Commercial realities
    i. Patients travel to outpatient medical service provider
    ii. Patients are unwilling to travel more than 20 miles from home for any of the four relevant services
    iii. All nonhospital outpatient clinics in Missoula Country are in the city of Missoula and within three miles of each other
    iv. The closest location of nonhospital outpatient clinics outside of the Missoula metropolitan area is 60 miles away in Superior, MT
b. Hypothetical monopolist test
    i. Demand from services in each specialty in the Missoula metropolitan area is essentially inelastic for each of the two types of targeted customers
    ii. With inelastic demand, there is essentially no actual loss of customers to outside providers with the imposition of a SSNIP
    iii. When there is no actual loss, the HMT test is satisfied under a until critical loss implementation

7. Horizontal analysis

a. Market participants and market shares
    i. *Market participants*: Separately in each of the four relevant specialties, all nonhospital outpatient physicians in Missoula with that specialty
    ii. *Market shares*: Can use number of nonhospital outpatient physicians in each of the four specialties in Missoula

b. *PNB* presumption
    i. *Note*: Need to use brute force to calculate before and after market shares and HHIs because not all MMC physicians will transfer to providence
    ii. HHI calculation—see chart at end[6]
c. Explicit theories of anticompetitive harm
    i. Unilateral effects
        1. Merger to monopoly in—
            a. OB/GYN nonhospital outpatient services
            b. General surgery nonhospital outpatient services
        2. Merger to near-monopoly in—
            a. pediatrician nonhospital outpatient services
    ii. Coordinated effects
        1. The only two major firms in each nonhospital relevant market
        2. Merger results in only one major firm, facilitating coordination with the fringe in—
            a. pediatrician nonhospital outpatient services
            b. Adult PCP nonhospital outpatient services

        NB: Arguably, the auctions to be "in-network" for an insurance company could mitigate or eliminate the coordinated effect. To be complete, this issue should have been spotted and argued one way or the other.
d. Downward pricing pressure defenses
    i. Entry/expansion/repositioning—Barriers too high
        1. Recruiting physicians into Missoula is very difficult
            a. For the last three years, Providence has been trying unsuccessfully to recruit additional pediatricians, OB/GYNs, and general surgeons to expand its hospital and clinics
            b. Recruiting physicians in Missoula is challenging because of the area's geographic location, perceived adverse weather conditions, and the lack of Montana OB/GYN and pediatrics residency programs
    ii. Efficiencies (three claimed)
        1. 340B Program—INAPPLICABLE
            a. The efficiency only benefits Medicare and Medicaid patients, which are not in any of the relevant markets where an anticompetitive effect is threatened
            b. Efficiencies are not a defense in markets where the there is a merger to monopoly
            c. No evidence of verifiability or sufficiency in other markets
        2. Access to St. Joseph's lab—REJECTED
            a. Decreases turn-around time for lab patients, but provides no cost savings → No downward pricing pressure to offset any upward price increases to insurance companies

[6] Some students concluded that there was insufficient information in the hypothetical to perform an HHI analysis. While the hypothetical did not provide revenues for each market participant, it did list the number of doctors by specialty by market participant. The number of doctors provided a sufficient metric of market significance to be used to calculate the market shares and HHIs.

b. Efficiencies are not a defense in markets where the there is a merger to monopoly
c. No evidence of verifiability or sufficiency in other markets
d. Also, not merger-specific if MMC could have created its own laboratory on-site

3. Improve MMC patient service quality by embedding behavioral health therapists into MMC's primary care clinics, assisting in enrolling MMC cancer patients in clinical trials outside the Missoula area, and creating an electronic medical record (EMR) system for MMC—REJECTED
    a. In each case, claimed efficiency is not merger specific: If MMC invested the resources, it could accomplish each of these efficiencies without the merger
    b. Efficiencies are not a defense in markets where the there is a merger to monopoly
    c. No evidence of verifiability or sufficiency in other markets

iii. Failing firms—Not applicable
1. Revenues have been increasing, *and*
2. No indication that MMC will not be able to continue to be a profitable business into the future

8. Vertical analysis

a. Foreclosure
i. MMC provides essential inputs to St. Mary's, a competitor of Providence
1. Referrals
2. Various medical services

ii. If Providence acquires MMC, providence will have the ability to foreclose St. Mary's from these inputs
1. Purchase agreement contemplates that MMC physicians will become Providence employees
    a. Can have hospital staff privileges only at Providence St. Joseph's, *and*
    b. any local referrals they make would have to be to physicians in Providence St. Joseph's hospitals and clinics
2. MMC physicians becoming Providence employees will be under a five-year employment contract, so that unless released none of these physicians could go join another practice or become a St. Mary's employee for five years (i.e. the foreclosure is for at least five years)
3. Becoming Providence employees is not a strict requirement, but Providence can terminate the purchase agreement if more than 8 MMC physicians decline to become Providence employees—So far:
    a. Two pediatricians are going to Grant Creek Family Clinic
    b. One OB/GYN is retiring
    c. One general surgeon is retiring
4. Referrals
    a. Assuming that these are the only departures from MMC, then the number of nonhospital outpatient physicians outside of the Providence system and potentially available to make referrals

i. All Missoula physicians available to make referrals: 24, down from 67
ii. MMC physicians: 2, down from 23

b. CONCLUSION—Since premerger merger the 23 MMC physicians accounted for 60% of the referrals to St Mary's, it is unlikely that the 2 non-Providence MMC physicians could provide St. Mary's with the referrals it needs to remain viable.

5. Provide medical services at St. Mary's
   a. Availability
      i. Pediatricians: 2, down from 8
      ii. OB/GYN: 0, down from 8
      iii. General surgery: 0, down from 6
   b. According, St. Mary's would have—
      i. No OB/GYN to provide childbirth coverage
      ii. No general surgeons to provide trauma coverage
      iii. Probably an insufficient number of pediatricians provide emergency pediatric coverage
   c. CONCLUSION—St. Mary's could not operate, or at least compete to be included as the hospital in an insurance network covering Missoula
   d. The foreclosure would result in reducing the number of hospitals in Missoula that could compete for inclusion in an insurance network from two to one

iii. Providence has no financial incentive not to foreclose St. Mary's. Indeed, the natural implications of Providence's business plan will be to foreclose ST. Mary's

iv. The foreclosure of St. Mary's from MMC referrals and physician services will cause St. Mary's to close and result in Providence's monopolization of hospital services in the Missoula market

LIKELY OUTCOME OF ANY INVESTIGATION

9. Likely outcome

a. The FTC and the Montana AG will conclude that the deal violates Section 7 by:
   i. Increasing prices in the Missoula metropolitan area in the provision of—
      1. Adult PCP nonhospital outpatient services
      2. Pediatrician nonhospital outpatient services
      3. OB/GYN nonhospital outpatient services
      4. General surgery nonhospital outpatient services

   to commercial health insurance companies
   ii. Increasing prices and lowering service quality in the Missoula metropolitan area in the provision of—
      1. Adult PCP nonhospital outpatient services
      2. Pediatrician nonhospital outpatient services
      3. OB/GYN nonhospital outpatient services
      4. General surgery nonhospital outpatient services

to patient beneficiaries of commercial health insurance companies

b. The FTC and the Montana AG will conclude that the deal violates Section 2 by foreclosing essential inputs to St. Mary's, resulting in Providence's monopolization of hospital services in the Missoula metropolitan area
c. The transaction cannot be fixed to eliminate antitrust violations
    i. Divestiture relief
        1. Unlike the DOJ, which has refused to enter into any consent decree since Jonathan Kanter became the AAG, the FTC has accepted divestiture consent decree in some cases
        2. A necessary (although perhaps not a sufficient) condition for the FTC to accept a divestiture consent decree in a horizontal merger is that, for each problematic market, the overlapping business of one of the merging parties must be completely divested
        3. The analogous condition in a vertical case is that the divestiture must eliminate the vertical aspect of each problematic market (e.g., to eliminate the vertical problem in hospital services, the merging parties must divest either St. Joseph or MMC)
        4. There is no divestiture relief that would negate the antitrust problems in this transaction and preserve any meaningful part of the acquisition
    ii. Behavioral relief
        1. While the FTC has accepted divestiture consent decrees, it has not accepted a behavioral relief consent decree since last half of the Trump administration
        2. Moreover, both the DOJ and FTC reject behavioral relief consent decrees that require continuous monitoring for compliance
        3. There is no behavioral relief that would negate the problem[7]

[7] Several students suggested a consent decree containing price caps to ensure that no antitrust price increase would occur. As we discussed in Unit 5, the federal antitrust authorities have *never* accepted price caps in a consent decree to solve a threatened price increase. There might be a possibility that the Montana State AG would accept a consent decree with a price cap, but that would need to be made explicit in the answer to be credited.

Separately, several students suggested that MMC physicians postacquisition be allowed to provide medical staff services and make referrals to St. Mary's. First, this is behavioral relief that the FTC in the Biden administration has not accepted. Second, even if the FTC was willing to entertain behavioral relief in some cases, this would not be one of them. Not only would the suggested relief require continuous monitoring to ensure compliance, but it begs the question of whether, even if allowed, MMC physicians now employed by Providence would make any referrals to St. Mary's and, even if they did, would the number of referrals be sufficient to keep St. Mary's in business. As for the provision of medical staff services to St. Mary's, these staff services would have to be provided by Providence (since MMC physicians would be Providence employees), entangling Providence and MMC in the foreseeable future contrary to express FTC policy.

PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

HHI Chart

Premerger

Provider	Adult PCP	Pediatricians	OB/GYN	General surgery	Total
Providence St. Joseph's	36	4	8	4	52
St. Mary's	6				6
Mid Montana Clinic (MMC)	23	6	8	6	43
University Doctors, P.C.	6	1		0	7
Center for Family Medicine	3			0	3
Baker Family Medicine	1			0	1
Grant Creek Family Clinic	4	1		0	5
Sole practitioners	2				2
	81	12	16	10	119

	Adult PCP		Pediatricians		OB/CYN		General surgery	
	Share	HHI	Share	HHI	Share	HHI	Share	HHI
Providence St. Joseph's	44.4%	1975	33.3%	1111	50.0%	2500	40.0%	1600
St. Mary's	7.4%	55	0.0%	0	0.0%	0	0.0%	0
Mid Montana Clinic (MMC)	28.4%	806	50.0%	2500	50.0%	2500	60.0%	3600
University Doctors, P.C.	7.4%	55	8.3%	69	0.0%	0	0.0%	0
Center for Family Medicine	3.7%	14	0.0%	0	0.0%	0	0.0%	0
Baker Family Medicine	1.2%	2	0.0%	0	0.0%	0	0.0%	0
Grant Creek Family Clinic	4.9%	24	8.3%	69	0.0%	0	0.0%	0
Sole practitioners	2.5%	3	0.0%	0	0.0%	0	0.0%	0
	100.0%	2934	100.0%	3750	100.0%	5000	100.0%	5200
Combined share	72.8%		83.3%		100.0%		100.0%	
Premerger HHI		2934		3750		5000		5200

Departures from MMC

One OBGYN → retiring
One surgeon → retiring
Two pediatricians → GRFC

	1	1	
			2

Postmerger

Provider	Adult PCP	Pediatricians	OB/CYN	General surgery	Total
Providence St. Joseph's	59	9	15	8	91
St. Mary's	6	0	0	0	6
University Doctors, P.C.	6	1	0	0	7
Center for Family Medicine	3	0	0	0	3
Baker Family Medicine	1	0	0	0	1
Grant Creek Family Clinic	4	1	0	0	5
Sole practitioners	2	0	0	0	2
	81	11	15	8	115

	Adult PCP		Pediatricians		OB/CYN		General surgery	
	Share	HHI	Share	HHI	Share	HHI	Share	HHI
Providence St. Joseph's	72.8%	5306	81.8%	6694	100.0%	10000	100.0%	10000
St. Mary's	7.4%	55	0.0%	0	0.0%	0	0.0%	0
University Doctors, P.C.	7.4%	55	9.1%	83	0.0%	0	0.0%	0
Center for Family Medicine	3.7%	14	0.0%	0	0.0%	0	0.0%	0
Baker Family Medicine	1.2%	2	0.0%	0	0.0%	0	0.0%	0
Grant Creek Family Clinic	4.9%	24	9.1%	83	0.0%	0	0.0%	0
Sole practitioners	2.5%	3	0.0%		0.0%		0.0%	0
	100.0%	5458	100.0%	6860	100.0%	10000	100.0%	10000
Combined share	72.8%		81.8%		100.0%		100.0%	
Premerger HHI		2934		3750		5000		5200
Delta		2524		3110		5000		4800
Postmerger HHI		5458		6860		10000		10000