

## **Emerging Antitrust Policy and Practice in Health Care Mergers**

*A Webinar Presented by Economists Incorporated and  
Womble Carlyle*

### **Hypothetical Case**

In MidAmerica, a town of 150,000 residents (and in a county with a population of 300,000), there were historically three hospitals: Little Engine Hospital, with 55 beds; Sisyphus Hospital, with 145 beds and an historical religious affiliation; and Godzilla Medical Center, the 312-bed, flagship hospital of Godzilla Healthcare System. Godzilla Healthcare System is comprised of 5 hospitals that serve 11 counties and has an affiliation with New University Medical School to provide training for residents.

Despite Little Engine's small physical plant, it has a relatively deep service line offering, providing most of the same tertiary services provided by Sisyphus and Godzilla Medical Center. Additionally, Little Engine has a solid reputation in the community, as it consistently provides high quality of care and is known for excellent patient service. Little Engine's primary handicap in continuing to compete with the other facilities in MidAmerica is its inability to access capital to make needed improvements, as credit markets have dried up during the economic downturn. Because Little Engine is falling behind its competitors in capital improvements, it has experienced a fairly steady decline in admissions.

Historically, the three hospitals have had contentious relationships: frequent medical practice disputes and breakups, real estate and zoning battles, and recruiting issues have had peaks and valleys. PPOs, HMOs, outpatient clinic battles and other payor issues have been part of the competitive landscape. MidAmerica itself has seen its population decrease in the 1990s, but a reinvention as a center for crop science biogenics and alternative energy has attracted research money and corporate subsidiaries looking to relocate employees to lower cost and more pleasant environments. Rumors of the relocation of a major Australian pharmaceutical company, with the potential for creating 2,000 jobs, have fueled community reinvestment and a building boom. The population is represented by 30% over the age of 55; 20% between 40 and 55; 20% between 30 and 40; 20% between 18 and 30; and 10% under 18. College educated or better is 35% of the population; 90% are high school graduates.

In 2001, the community's cardiovascular surgery group split; 8 doctors entered into employment arrangements with Godzilla and the remaining 4 doctors were hired by Little Engine. Sisyphus has never offered cardiovascular surgical services.

In late 2007, Godzilla announced its intentions to acquire Little Engine. In its announcement and in its terms sheet and other business documents, Godzilla announced that it would expand its family medicine, oncology, and OB/GYN practices by adding a Women's Health Center to Little Engine through new construction. It also announced its intention to add to Godzilla Medical Center, a sports medicine/MRI facility, with ancillary facilities at each of its other four smaller hospitals. The total acquisition price of Little Engine was \$38 million, falling well below the Hart-Scott-Rodino ("HSR") premerger notification threshold. Because the deal was not

HSR reportable, transaction and antitrust counsel for the hospitals opted not to voluntarily approach the DOJ, FTC, or state attorney general to discuss the procompetitive merits of the transaction. The deal closed on January 30, 2008.

Sisyphus recently announced that its agreements with payors resulted in a 15% reduction of previous agreements and that, in an effort to reduce costs, it would reduce the number of inpatient beds to 100. Additionally, Sisyphus lost its three nephrologists to Godzilla, thereby shutting down its inpatient nephrology practice and its wholly-owned outpatient dialysis clinic.

Prior to the announced acquisition, Little Engine was regarded as the “low-cost” hospital in MidAmerica. With all its bells and whistles, Godzilla Medical Center was regarded as the highest cost facility, with Sisyphus falling somewhere in between. Godzilla Healthcare System contracts with payors on a system-wide basis. Accordingly, once Little Engine was folded into the system, it benefitted from the system’s higher rates, such that its rates increased by approximately 25%.

Now that all of the area’s CV surgeons and nephrologists are affiliated with Godzilla, payors have no choice but to include Godzilla in their networks. In the latest round of contract negotiations, Godzilla has requested exclusive arrangements, looking to cut out Sisyphus altogether.

Not surprisingly, payors are not pleased with Godzilla’s recent negotiating tactics and a few – including the largest payor in the state, Orange Cross/Orange Shield – have complained to the FTC. Sisyphus has approached the state AG as well as the FTC voicing similar concerns.

Now, nearly 2 years after the transaction was consummated, the FTC has opened an investigation of the transaction.