Coping with Concentration

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Approaches to Controlling Provider Market Power

- Antitrust Law
  - (Courts)
- Certificate of Public Advantage Regulation
  - (State Agencies)
- Provider Rate Regulation
  - (State Insurance Regulators)
- Regulatory Hodgepodge
  - (Federal & State legislatures: laws affecting payment, entry, integration)

See Greaney, *Coping With Concentration*, Health Affairs (Sept. 2017) http://content.healthaffairs.org/content/36/9/1564.short

Pervasive Consolidation

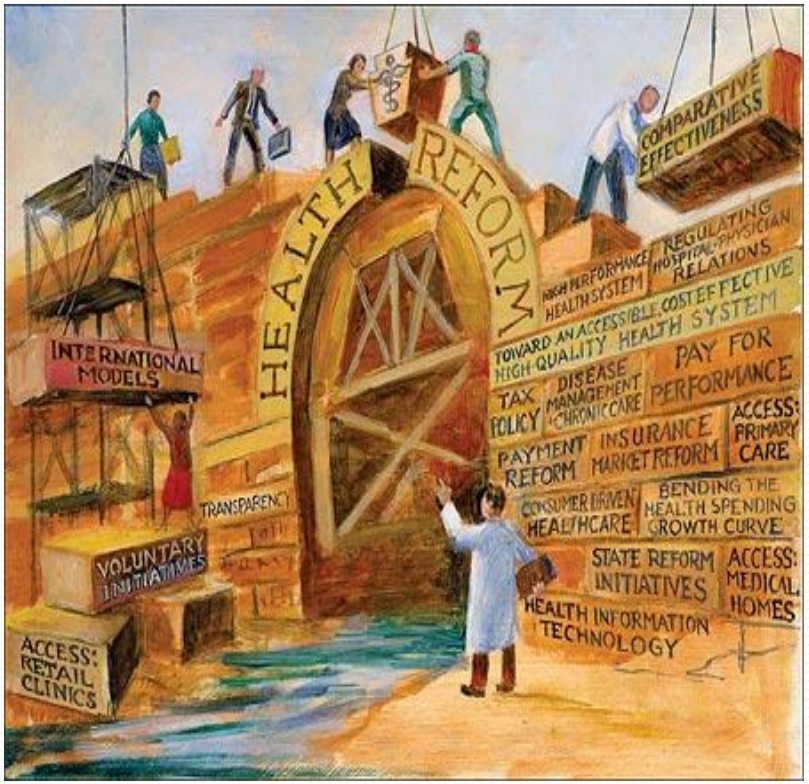
- **TOTAL**: 1500 mergers; 100 hospital; 88 M.D. group (2015)
- **Hospitals**
  - 80% of MSAs are highly concentrated
  - Average of 3.2 independent hospitals per market
- **Insurers**
  - Top 4 Insurers: 83% (2014)[*caveat*: Blues treated as 1)
  - Top 2 insurers have 50% of business in 46 states
- **Physicians**
  - Increased concentration in physician specialty services
  - Extensive *vertical* integration: hospitals acquiring practices.

Why Mergers Matter

- **Price Increases**
  - **Hospital** price increase >20% after mergers in concentrated markets
  - **Insurance** premium increase of 7% following Aetna Prudential merger
  - **Physician** prices for 15 high-cost, common procedures 8-26% higher in less competitive markets
- **Quality**
  - Studies show little/no positive effects on quality in concentrative provider markets

Competition Policy & Concentration

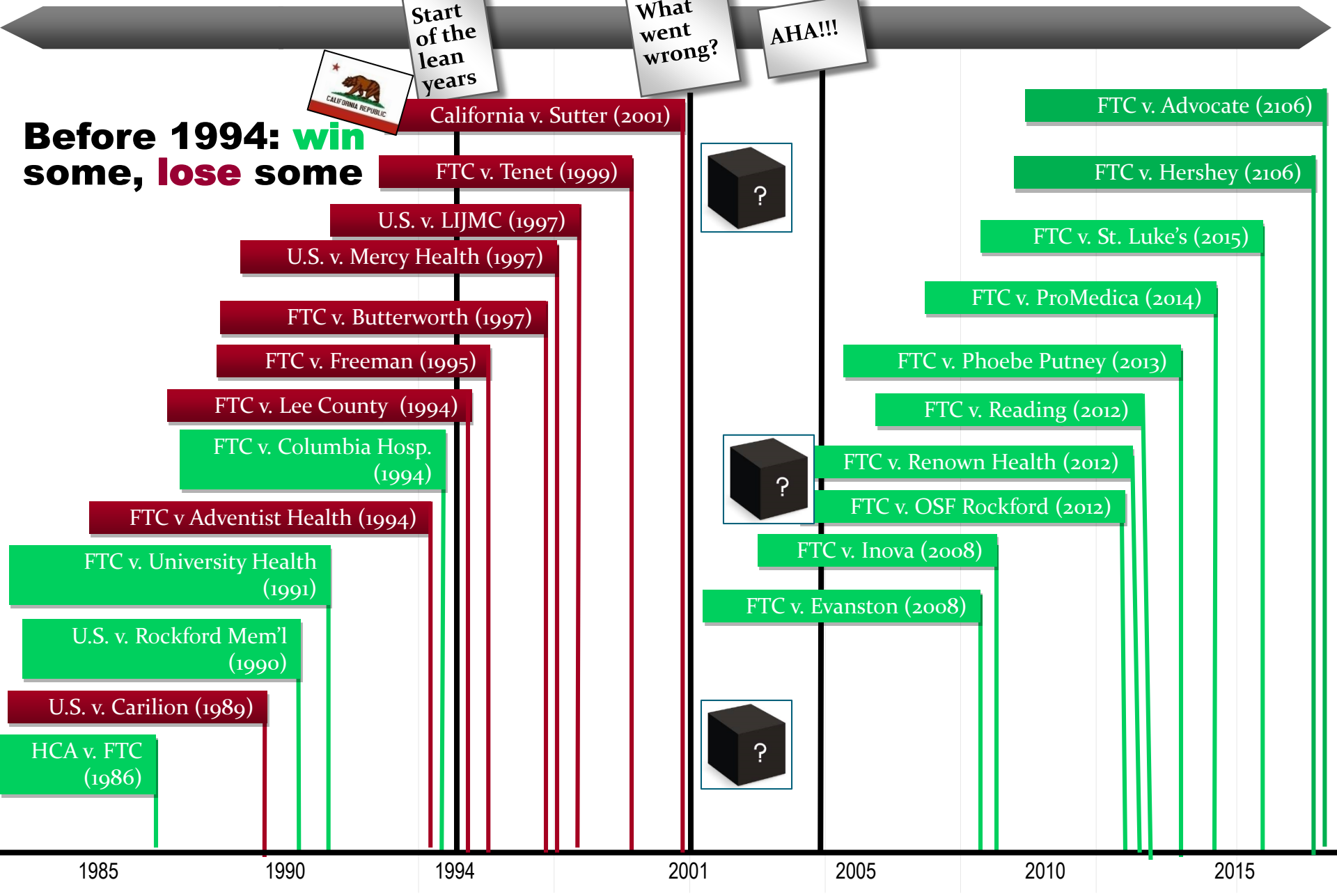
- **BOTH ACA** and **AHCA** built on a platform that depends on competitive provider markets
- **Health Policy** experts view provider concentration as major failing
- **Medicare Vouchers** require competitive provider markets



The Constrained (Restrained?) Role of Antitrust

- Antitrust has little impact on *extant provider* market power
  - A few important cases limiting improper exercise
    - But no impact as yet on "all or nothing" Ks; bundling; anti-tiering contracts etc.
- Merger enforcement: Roller Coaster Ride
  - Era of quietude following erroneous court decisions
  - Recent gov't victories may stabilize merger analyses in court
  - Vertical mergers left unchallenged
  - Uncertainty about vigor of Trump Admin. enforcement

Government hospital merger history…



Reversal of Fortune

- Government series of successful challenges
  - Hospital mergers
    - Advocate (Chicago); Hershey (PA); ProMedica (Toledo)
  - Physician mergers
    - St. Luke's (Idaho); Renknown (consent decree NV)
  - Insurance Mergers
    - Anthem/Cigna
    - Aetna/Humana
  - Conduct
    - BCBS Mich (MFNs)
    - Pharma (pay for delay)
    - Hillsdale (market allocation)
    - HR Guides (wage price fixing)

Lessons: Unavailing Defenses

The Sumo Wrestler Fallacy

Others

- The ACA Made Me Do It
- Rapidly changing market conditions
- Professional sovereignty
- Nonprofit status
- Integrative efficiencies
- Skepticism about managed care
- Corrective regulation

Other Lessons from litigation

- "Leverage" is central issue in analyzing mergers' effect
- Economic tools help identify relevant markets
- "Mavericks" matter
- Internal documents!
- Efficiencies are hard to demonstrate
- Consummated mergers may get a second look
- Monopsony power?
- Multiple insurance product markets
  - Large group, Medicare Advantage, ASO, Medicaid, etc

1. Makeshift Regulation: Conduct Remedies in Merger Cases

- Some State Attorneys General allow mergers to proceed conditioned on conduct:
  - Freeze in prices
  - Commitments on charity care; Medicaid access
  - Limits on future acquisitions
- Critique
  - Conscripting courts to be rate regulators
  - Static remedy in rapidly changing sector
  - Institutional competence
    - Partners Health: Massachusetts Superior Court

2. Regulation to the Rescue? Certificate of Public Advantage Laws

- Over 20 states have enacted COPAs
  - Most in disuse
- Substitute regulation of hospital rates, etc for competition
- Antitrust State Action Doctrine: State law
  - affirmatively express intent to displace competition &
  - actively supervise conduct
  - **Immunize** mergers & JVs from federal antitrust law
- Vehement FTC opposition
  - Avuncular letters to state legislatures: Largely ignored
  - COPAs active in RED STATES!

W. Va. Attorney General

"with the recent increased federal regulation in the health care industry, the trend of hospital consolidation will likely increase over the coming years as hospitals struggle to deal with the increased costs of regulation."

Change of Heart by W.Va AG

7-year Commitment

- Rate caps
- If operating margin >4%, rates reduced
- No non-competes
- Open medical staffs
- Bars opposition to CONs

<u>AG Supports</u> the merger AND COPA law empowering him to evaluate whether rates are "anticompetitive"

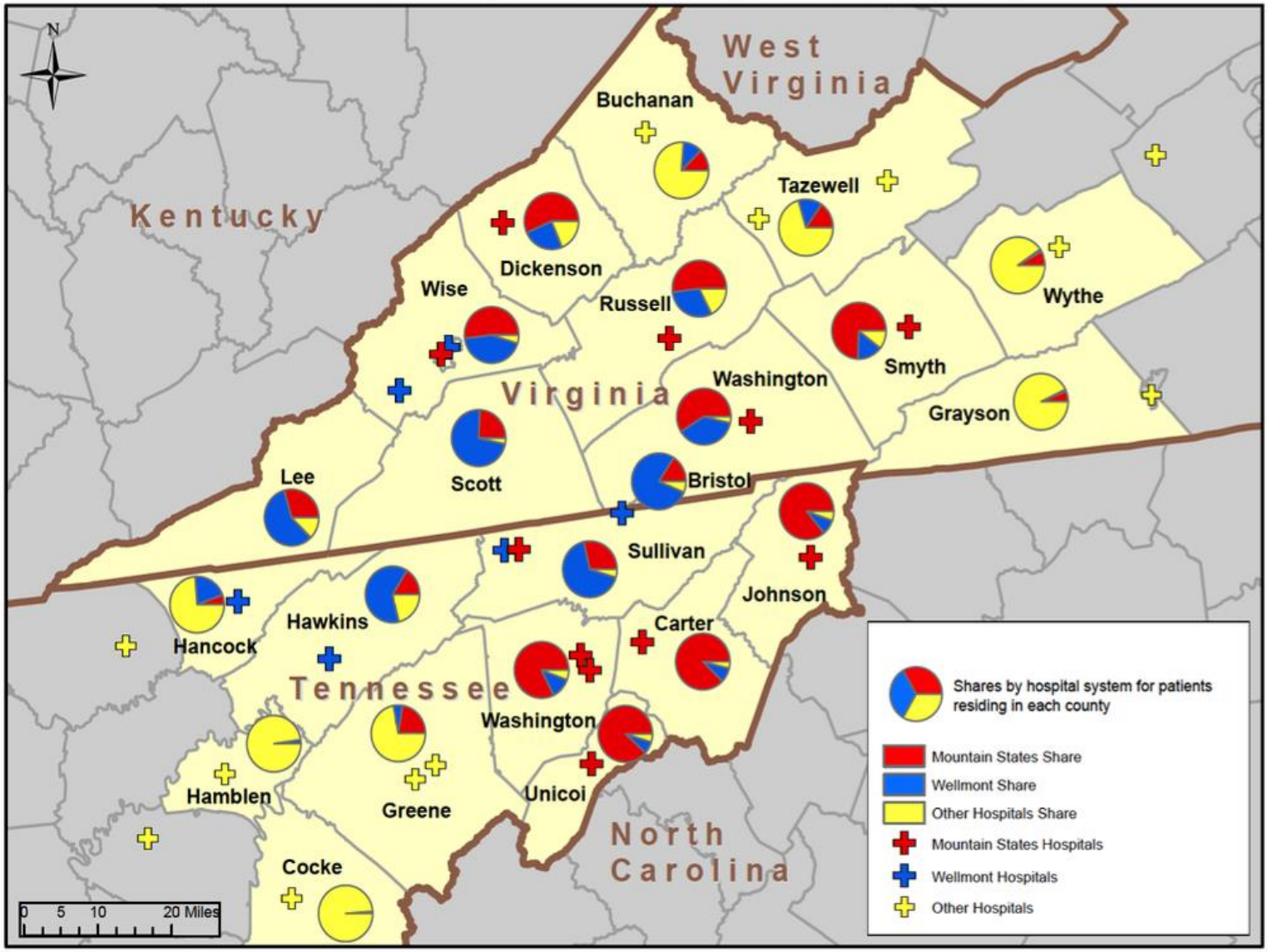
COPAs: FTC Waives the White Flag

- FTC challenge to Cabell/St. Mary's hospital merger in West Virginia
- State passes COPA law
  - WVA Authority and Attorney General given authority to regulate: freeze prices, bar future acquisitions, etc
  - Kitchen sink standard: Agency considers
    - cost, access, quality, education, etc.
- FTC abandons its challenge to the merger

COPAs in Action: Mountain States Health/Wellmont Health System Merger

- Two largest hospital systems in southwest Virginia and Northeast Tennessee
  - 71% of inpatient care
    - Post-merger HHI would be 5,161
      - increase of 2,441 points
    - Diversion ratios: 85% & 90%
  - Outpatient & physician markets also affected
- COPAs sought in <u>both</u> TN & VA

Shares of Commercial Inpatient Admissions by County by Hospital System



Source: Virginia and Tennessee State Hospital Discharge Data (2014).
Note: Shares for each county are based on commercial patients residing within that county and account for all hospitals located in Tennessee and Virginia, including hospitals located outside the scope of the map.

FTC Dives in: Participates in Mountain States Proceeding

- FTC Comments
  - Commitments on price & Quality
    - Difficult to monitor, implement and enforce
    - Do not replicate competition
    - Price commitments may result in HIGHER prices
    - Incentives to circumvent
  - COPAs are a bad idea
    - Monopoly in perpetuity
    - HERE: 2 states regulating simultaneously
  - Quality & Innovation will be diminished

Critiquing COPAs

- Do they confer antitrust immunity under the State Action Doctrine?
  - Active supervision requirement
- Key variables (price, quality, costs) hard to measure in health care
  - Quality metrics lacking or in their infancy
- Where price is regulated, quality often suffers
- Kitchen sink regulation
  - "*When everything is relevant nothing is dispositive*" (Judge Easterbrook)
- Capture, regulatory lag, administrative sloth
- Distinguish "sweetener" promises (achievable without merger) from merger-specific undertakings
- Long term issues
  - What happens if COPA law is repealed?
  - Innovation, changing market conditions

3. Hodgepodge Regulation?

- Empowering health insurance exchange negotiation to address provider reimbursement
- Limits on balanced billing
- Transparency Laws
- Prohibiting anticompetitive contracting
  - Anti-steering; anti-tiering; all-or-nothing contracting
- Removal of Entry Barriers
  - Certificate of Need reform
- Payment and regulatory reforms
  - Loosen restrictions on physician controlled hospitals
  - See Gaynor et al, *Making Markets Work* (Brookings); NASI, *Addressing Pricing Power in Health Care Markets*

4. Targeted Regulation: State Initiatives to Limit Provider Pricing

- **Rhode Island Office of Health Insurance**
  - Authority to improve quality, accessibility & affordability
  - Regulates growth in provider rates in annual review of insurer premium filings
    - Hospital inpatient and outpatient rates growth rate limits
      - <3% (2016) declining to 1.5% (2019)
        - Waivers granted where special circumstances arise
    - Requires increased payments by insurers to primary care

Massachusetts: Special Commission on Provider Price Variation

- Focus on Wide variation in prices paid to hospitals
- Recommends adoption of measures to limit and "compress" provider reimbursement levels
  - Price transparency
  - "Warranted" and "unwarranted" factors for variation
  - Set floor and ceiling for provider payment increases
- Other recommendations
  - Controls on "surprise billing" and out of network issues

Assessment

- Antitrust enforcement: Limited efficacy in controlling extant market power
- Conduct remedies: Doubts re institutional capabilities of courts; rate freezes poor proxy for markets
- COPAs: Kitchen sink problems; regulatory capture; administrative lag, etc
- Hodgepodge: Helpful at the margin, but limited efficacy against entrenched provider market power
- State Provider Payment Caps: *Targeted focus* on *dominant providers* best option

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