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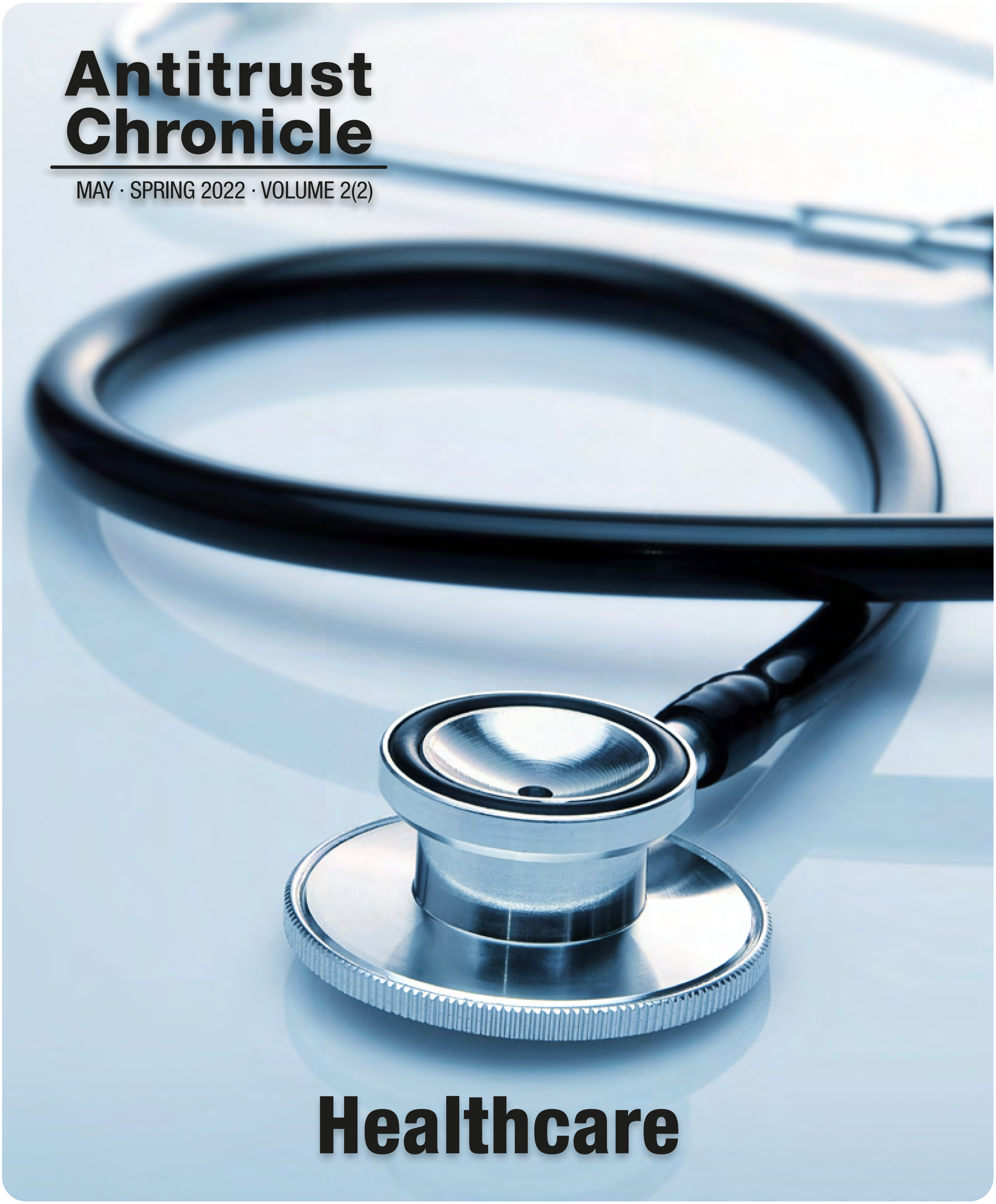

Healthcare

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TABLE OF CONTENTS

LABOR MARKETS IN HEALTHCARE TRANSACTIONS: A WORK IN PROGRESS

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  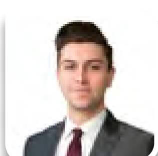

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I. INTRODUCTION

"We will fight for American workers, including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these to continue and increase."[2] So said Assistant Attorney General Jonathan Kanter recently in a joint workshop with the Federal Trade Commission. This sentiment, which once may have been considered outside the antitrust mainstream, is now widely shared among antitrust enforcers and policymakers alike. In just the last few years, the Biden Administration, Mr. Kanter's predecessors at the Department of Justice, the FTC, and the U.S. Treasury Department have all weighed in on the importance of competition in labor markets.

Historically, labor has often been treated as an afterthought in agency merger reviews, if considered at all. Frequently lumped in with other "deal synergies," reductions in headcount were line items among the transaction benefits touted by merging parties as a means for the merged firm to lower its costs. Until recently, improved labor costs were commonly highlighted as a key driver in many deals, and presented to the antitrust agencies as a reason to expect the deal to make the combined firm more competitive. Merging parties now take that approach with the agencies with caution.

Still, the agencies are wading into relatively uncharted waters. They have no clear mandate from the courts to challenge deals based on lost competition for labor, as antitrust litigation alleging anticompetitive behavior by employers in labor markets has been relatively rare and principally concerned conduct like "no poach" agreements or industries like sports leagues that raised idiosyncratic issues.[3] But the agencies' shift in focus now puts labor competition in play for mergers across all industries, and particularly in healthcare, where deals are often closely scrutinized and agency staff have demonstrated a willingness to investigate and challenge even small or "under the radar" transactions.

So it is fair to ask: what grounds do the U.S. antitrust agencies have for challenging a merger where competition for employees might be reduced? And what, if any, steps can merging parties take to head off a potential fight with agency staff over the impact their transaction will have on labor markets? In this paper, we attempt to answer those questions, at least preliminarily, and peer down the road ahead.

II. THE BIDEN ADMINISTRATION AND ANTITRUST AGENCIES' GROWING EMPHASIS ON LABOR MARKETS IN MERGER REVIEWS

A. Leadership Across the Administration Turns Eye Toward Labor Markets

It is no secret that the Biden administration and leadership at the U.S. antitrust agencies are focused on labor markets, turning a source of potential cost savings for merging parties into a wellspring of FTC and DOJ staff questions.[4] President Biden's Executive Order in July 2021 underscored the importance of competition in labor markets.[5] As a result of that order, the U.S. Treasury Department released a report in March concluding that "uncompetitive firm behavior in labor markets" can hurt workers, create barriers to mobility, and weaken the economy as a whole.[6] The Treasury Department found that many American labor markets display high concentration levels and raised concerns specifically about healthcare labor markets, citing "evidence that hospitals exerted considerable monopsony power" -- i.e. buyer market power over suppli-

2 Flavia Fortes, *US DOJ to Boost Efforts to Protect Competition in Labor Market, Kanter Says*, MLex (Dec. 6, 2021), https://content.mlex.com/#/content/1342523?referrer=-search_linkclick.

3 E.g. *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1084 (7th Cir. 1992).

4 On July 9, 2021, President Biden signed an executive order on Promoting Competition in the American Economy. News Release, The White House, Fact Sheet: Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment (Apr. 26, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment/.

5 *Id.*

6 U.S. Dep't Of Treasury, The State Of Labor Market Competition (Mar. 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

ers.[7] The report found that despite a growing population, the total number of hospitals fell from 7,156 in 1975 to 6,093 in 2021 nationwide.[8] As this consolidation occurred, the Treasury Department concluded that hospitals gained buyer power in labor markets, particularly where mergers resulted in much higher market concentration.[9]

U.S. Attorney General Merrick Garland recently spoke about labor markets in merger analysis at a White House Roundtable, stating that "[o]ur review will ensure, among other things, that merger guidelines fully address the potential for mergers to harm labor market competition."[10] AG Garland also highlighted a plan for increased collaboration between the Justice Department and the Department of Labor to promote competitive labor markets and worker mobility.[11] Federal Trade Commission Chair Lina Khan has similarly emphasized that the FTC will ensure that it is using all available tools to tackle unfair methods of competition that affect workers: "One of my top areas of focus at the FTC is ensuring that we consider labor markets when investigating potentially illegal mergers."[12] The FTC and DOJ also recently launched a joint initiative to revise their merger guidelines, in part to ensure that merger investigations account for harms to workers and labor market competition.[13]

B. Labor Markets Begin to Feature in Merger Challenges

There have been instances where labor market issues have arisen in cases under past administrations alongside more traditional competitive effects. For example, in DOJ's challenge to the 2006 acquisition of Pacificare Health Systems by UnitedHealth Group, in addition to concerns about anticompetitive effects in markets for the sale of commercial health insurance, DOJ alleged that the merger would adversely impact markets for the purchase of physician services in Arizona and California.[14] DOJ was satisfied, however, that divestiture and other remedies ordered in that case resolved both types of concerns.[15]

In 2017, the D.C. Circuit affirmed DOJ's successful challenge of a merger between health insurers Anthem and Cigna.[16] Among other deal benefits, the merging parties claimed that they would be able to bargain for lower rates from healthcare providers post-merger. But, far from finding that this was a merger efficiency that should count in favor of the transaction, the Court described such bargaining power as an exercise of monopsony power in the merging firms' supply markets.[17] In her concurring opinion, Judge Millett challenged the dissent opinion's suggestion that an exercise of increased bargaining power short of monopsony is beneficial: "securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so 'simply transfers income from supplier to purchaser without any resource savings.'"[18]

The DOJ's recent challenge to the proposed merger between Penguin Random House and Simon & Schuster, two large book publishers, reflects the evolving approach to labor markets in merger enforcement. There, labor concerns are front-and-center: DOJ's theory of the case

7 *Id.* at 41. In economic terms, a market with a single buyer has "monopsony power" to pay lower prices for its inputs (i.e. what it buys). In a labor market, monopsony power may exist if workers have only one option (or very few options) for employment (e.g. a classic "company town"). As the sole buyer of labor, the monopsonistic firm can hire fewer workers at a lower wage than in a competitive labor market where workers have many choices. *See generally* Council of Economic Advisers (CEA), *Labor Market Monopsony: Trends, Consequences, and Policy Responses* (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf. While fewer workers may translate into less output for the firm, the lower wages may reduce overhead and thus be profit-maximizing. In short, "by recruiting less aggressively, paying less, and sacrificing some employment, employers with monopsony power can shift some of the benefits of production from wages to profits." *Id.* at 2.

8 U.S. Dep't Of Treasury, The State Of Labor Market Competition, 41 (Mar. 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

9 I*d.* at 41-42. At least one commentator has suggested that fewer hospitals in a market also increases the likelihood of collusion harming workers. E.g. Alan Krueger, *Reflections on Dwindling Worker Bargaining Power and Monetary Policy*, Luncheon address to FRB Kansas City's Jackson Hole Symposium, (Aug. 24, 2018), https://www.kansascityfed.org/documents/6984/Lunch_JH2018.pdf.

10 Merrick B. Garland, Att'y Gen., Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy, MLex (Mar. 7, 2022), https://content.mlex.com/#/content/1364094?referrer=search_linkclick.

11 *Id.*

12 Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks at White House Roundtable on the State of Labor Market Competition in the U.S. Economy (Sept. 22, 2021), https://www.ftc.gov/system/files/ftc_gov/pdf/Opening%20Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20WH%20Labor%20Roundtable.pdf.

13 Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

14 Compl., *United States v. UnitedHealth Group, Inc.*, 1:05-cv-02436 (D.D.C. Mar. 3, 2006) at 31-43, 44-53, https://www.justice.gov/atr/case-document/complaint-229.

15 Competitive Impact Statement, *United States v. UnitedHealth Group, Inc.*, 1:05-cv-02436 (D.D.C. Mar. 3, 2006), https://www.justice.gov/atr/case-document/competitive-impact-statement-214.

16 *United States v. Anthem, Inc.*, 855 F.3d 347, 348 (D.C. Cir. 2017).

17 *Id.* at 370-371.

18 *United States v. Anthem, Inc.*, 855 F.3d 347, 371 (D.C. Cir. 2017) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, 106 (2016)).

is premised on the transaction's impact on authors, particularly authors of anticipated top-selling books.[19] The complaint alleges that the deal would give Penguin Random House control of close to half the market for the acquisition of publishing rights to anticipated top-selling books, "leaving hundreds of authors with fewer alternatives and less leverage."[20] The case only alleges harm to consumers indirectly. Given competition from a wide range of other publishers (many beyond traditional book publishers), DOJ likely would have faced an uphill battle showing that the transaction would lead to higher prices on books to consumers.[21]

Meanwhile at the FTC, two Commissioners recently raised labor markets as a competitive concern in a healthcare merger. In voting out the FTC's challenge to the merger of Lifespan Corp. and Care New England Health System, Chair Khan and Commissioner Slaughter's concurrence stated that, in addition to harm to healthcare services markets, they would have supported an allegation that the merger would substantially lessen competition in labor markets: "We take seriously concerns about competition in labor markets and will be vigilant in probing the effects mergers may have on competition for workers' labor. We applaud the staff for their thorough and diligent investigation of the labor market implications of this transaction, and we expect such analysis to continue in future cases."[22]

The FTC also wrote to Texas regulators in September 2020 warning that if the state allowed two competing hospitals in rural West Texas to merge, it would result in depressed wages for registered nurses.[23] The FTC did not mince words, arguing that mergers generating large increases in employer concentration have meaningful and statistically significant harmful effects on employee wages, and that the transaction would result in serious competitive and consumer harm and lower wage growth for nurses.[24] Despite the FTC's concerns, however, Texas allowed the hospitals to close the deal.[25]

III. DO THE ECONOMICS SUPPORT THE AGENCIES' LABOR MARKET CONCERNS?

Against this backdrop, the economics of labor markets will play a key role in determining whether courts go along with the agencies and block deals. Certain recent economic studies -- several by the same group of authors -- claim to find that labor market concentration may be widespread and concentration may lead to lower wage growth.[26] One paper by Azar et al. attempts to estimate concentration in labor markets based on share of posted vacancies (as opposed to employment shares). To navigate the tricky task of identifying geographic labor markets, Azar et al. used commuting zones by 6-digit Standard Occupational Classification ("SOC") occupation as a proxy.[27] On the high end, the authors estimated that 60 percent of U.S. labor markets are "highly concentrated" and another 11 percent are "moderately concentrated."[28] However, the study's

19 Compl. at 2, *United States v. Bertelsmann SE & Co. KGaA et al.*, 1:21-cv-02886 (D.D.C. Nov. 2, 2021).

20 *Id.* at 7.

21 *Id.* at 17-21.

22 Comm'r Slaughter and Chair Khan, Concurring Statement, *FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System* (emphasis added), 2, FTC File No. 2110031 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf. Notably, in its decision denying the merging parties' application under separate Rhode Island legislation, the Rhode Island Attorney General expressly cited potential harm to Rhode Islanders working in skilled healthcare jobs as a basis for his decision. Decision, Rhode Island Att'y Gen., Denial of Initial Application of Rhode Island Academic Health Care System Inc. et al. (Feb. 17, 2022), https://www.riag.ri.gov/media/2996/download.

23 FTC Staff, Comment to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf. A COPA is a written certificate typically issued by a state department of health under state law and regulations that seek to displace federal (and sometimes state) antitrust laws. Alexis Gilman, *FTC to Study the Impact of COPAs*, Crowell (Oct. 29, 2019), https://www.cmhealthlaw.com/2019/10/ftc-to-study-the-impact-of-copas/.

24 FTC Staff, Comment to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf.

25 Brian Bethel, *Hendrick Health System-Abilene Regional Medical Center Merger Moves Forward*, Report News, https://www.reporternews.com/story/news/2020/10/05/hendrick-hospital-medical-center-abilene-regional-hospitals-merger-approved/3625154001/, (last updated Oct. 5, 2020).

26 José Azar & Ioana Marinescu & Marshall Steinbaum & Bledi Taska, *Concentration in US labor markets: Evidence from Online Vacancy Data*, Labor Economics, vol. 66 (2019), https://www.nber.org/system/files/working_papers/w24395/w24395.pdf.

27 The paper defines a labor market as a six-digit SOC ("Standard Occupational Classification") by commuting zone (e.g. accountants and auditors in the Philadelphia commuting zone). Commuting zones were developed by the USDA to capture local economies and local labor markets in a way that is more economically meaningful than county boundaries. *Id.* at 9-10.

28 Under the FTC and DOJ's 2010 Horizontal Merger Guidelines, moderately concentrated markets have HHI between 1500 and 2500 and highly concentrated markets have HHI above 2500. In this case, market shares are based on the share of job vacancies of all the firms that post vacancies in that market. *Id.* at 9.

underlying assumptions and focus appear to have a significant impact on its findings, particularly in their application to healthcare. For example, when considering the percentage of workers that actually face highly concentrated markets, the study found that only 28 percent of employment is in markets that are either highly or moderately concentrated, meaning 72 percent of employment is in markets that would be considered "unconcentrated" under the current DOJ and FTC Merger Guidelines.[29] Moreover, when examining market concentration levels faced by workers in common occupations, the study found that registered nurses faced the lowest concentration of the 30 occupations examined.[30]

Another paper by Azar et al. finds that higher labor market concentration leads to lower wages for workers, concluding that an increase in the Herfindahl–Hirschman index ("HHI") of 200 in a market of 2,000 (moderately concentrated) is associated with a 1.4 percent decrease in wages.[31] The sole source of data for the analysis was a single website, CareerBuilder.com, from which the authors pulled posted wage information that does not contain all vacancies in the occupations they studied, and, as they concede, could lead to overestimation of labor market concentration.[32] The authors also acknowledge that "the correct geographic definition for labor market competition for hiring is still an open question," although they believe the results would be similar if other "plausible" geographic labor market definitions were applied.[33] This study also found -- consistent with the first Azar study above -- that markets for registered nurses were among the lowest concentrated , averaging just over 2,000 HHI.[34]

A study by Qui et al. found that reducing concentration of a labor market from the 75th percentile (0.045) to the median level (0.017) would imply an 8.7 percent increase in wages and a 2.0 percent increase in the probability of being covered by work-based health insurance.[35] The study used core-based statistical area ("CBSA") data as proxy to define geographic local labor markets, Dun & Bradstreet ("D&B") data on location, industry, and annual sales to calculate product market concentration, and employment-based HHI (rather than vacancy-based as found in the Azar study) to estimate local market concentration.[36] However, another analysis in the Qui et al. study yielded a different result – estimates from their ordinary least squares ("OLS") analysis, which uses various fixed effects (e.g. comparing workers within the same product-market-year but different occupations) and observable controls (e.g. worker demographics), show a very small positive effect on wages, or at worst, a neutral effect.[37] These results taken together may imply an inconclusive link between labor market concentration and wages. Interestingly, the study also found that current average labor market concentration levels are below what they were in the year 2000.[38]

Kevin Rinz's 2018 paper weighed in on the concentration debate by studying the relationship between national and local industrial markets, as a proxy for labor markets.[39] Using North American Industry Classification System ("NAICS") industries within commuting zones and trends from the Census Bureau's Longitudinal Business Database ("LBD"), Rinz compared concentration trends between 1976 and 2015. He found that while increases in local industrial concentration can reduce earnings, on average, local industrial concentration was lower in 2015 than in 1976, even as national industrial concentration increased.[40] According to Rinz, major firms have expanded into the same markets (i.e. cities), thus reducing local concentration. As a result, average annual earnings were 1.2 percent higher in 2015 than they would have been if average local industrial concentration had remained at its 1976 level.[41]

How does this all apply to healthcare? The conclusions one might draw from these studies with respect to merger effects on healthcare labor markets are unclear. Other studies suggest that hospital mergers may have adverse wage effects in certain cases.

29 *Id.* at 15.

30 *Id.* at 14-15.

31 Azar, José & Marinescu, Ioana Elena and Steinbaum, Marshall, *Labor Market Concentration*, 16 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088767.

32 *Id.* at 20.

33 *Id.* at 18.

34 *Id.* at 11-12, Figure 4.

35 Yue Qui & Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation,* 22 (2019), https://ssrn.com/abstract=3312197.

36 Core-based statistical area data is a geographic area as defined by the U.S. Office of Management & Budget. *Id.* at 6.

37 *Id.* at 15-17, 23, 31-32, 57. Ordinary least squares (OLS) analysis is a statistical method of analysis that estimates the relationship between one or more independent variables and a dependent variable. *Id.* Qui et al. also ran the OLS analysis using commuting zone data to define geographic local labor markets and found that the results were qualitatively similar. *Id.* at 6, 57, 58.

38 *Id.* at 4.

39 Rinz, Kevin, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility*, Technical Report (2018), U.S. Census Bureau Center for Administrative Records Research and Applications, https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf.

40 *Id.* at 3-4.

41 Rinz, *supra*, at 28.

In what may be the most extensive examination of hospital merger effects on wages, Prager and Schmitt examined the labor market impacts of hospital mergers nationwide over a 10-year period.[42] Their study found that wage growth slowed following hospital mergers leading to significant increases in employer concentration, but only for workers whose skills were industry-specific. The study found that wages for employees who were closely tied to the medical profession (e.g. nurses) experienced a slowdown in growth, but wages for employees whose skills were more transferable to other industries (e.g. cleaning or maintenance) did not.[43] In particular, hospital mergers within the same market resulted in slowdowns in wage growth, but only for workers whose employment prospects were closely linked to hospitals and only in mergers that dramatically increased employer concentration (the top quartile of mergers in terms of concentration).[44] The authors of the study note that the wage growth slowdown found in their study may only apply in a narrow set of circumstances (i.e. highly concentrative mergers and industries in which skills have limited transferability).[45]

A separate 2010 study attempted to track the impact of employer concentration in the nurse labor market based on changes in wages at Veterans Affairs ("VA") hospitals, which are set on a local level. This study suggested that upstream demand for specialized labor (nurses) to individual hospitals is relatively inelastic.[46] In other words, changes in prices (or wages) produced small changes in demand for jobs. The study estimated that a 10 percent decline in nurses' wages only decreased employment by about 1 percent in the short run.[47] An important consideration, however, is that the data source used in this study – limited to VA hospital wages – may not be a fair predictor of the effects of private mergers on nurse wages, particularly in areas where nurses have options beyond hospitals, such as nursing homes. So while inelastic demand could have implications in merger analysis, the study leaves many unanswered questions.

It is debatable whether these studies accurately reflect reality and can be reconciled with real-world experience in healthcare. For nurses in particular, there is a well-documented shortage crisis for hospitals nationwide. A study done by New York-based consultant Mercer, found that if current trends continue, 29 states will not be able to fill demand for nurses in the next five years.[48] The crisis is especially dire in Pennsylvania, which by 2026, will lead the nation with a shortage of 20,345 nurses.[49] As demand for healthcare workers has soared, their wages have risen substantially nationwide,[50] with one study analyzing Western Pennsylvania finding that the average hourly wage paid to a medical staffing agency for a nurse assistant position rose 444 percent between 2019 and 2021, (from $9 per hour to $49 per hour).[51]

IV. THE WAY FORWARD

It is clear that the antitrust agencies will increasingly focus on labor markets in mergers across all industries, and healthcare deals will be no exception. As with conventional merger analysis, we can safely expect antitrust regulators to apply HHI screens to healthcare labor markets to identify mergers significantly increasing concentration. They will likely use such assessments to determine whether a merger warrants a Second Request or potentially a court challenge on the basis that lost competition for employees will lead to lower wages or reduced benefits.

42 Elena Prager and Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 3, American Economic Review, 111(2): 397-427 (2021), https://www.kellogg.northwestern.edu/faculty/research/researchdetail?guid=02d42579-ffeb-11e8-91be-0242ac160003.

43 Over the four years after a merger where the market concentration was significantly increased, nominal wages were 4 percent lower for skilled workers and 6.8 percent lower for nurses and pharmacy workers than they would have been absent the merger. Post-merger annual wage growth of 1 percent and 1.7 percent points represents a reduction compared to the average annual nominal wage growth of 3 percent to 4 percent. *Id.* at 3.

44 *Id.* at 34.

45 *Id.* at 14.

46 Douglas O. Staiger, Joanne Spetz, & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a natural experiment,* Dartmouth Scholarship. vol. 1780 (2010), https://digitalcommons.dartmouth.edu/cgi/viewcontent.cgi?article=2783&context=facoa.

47 *Id.* at 231.

48 Cassie Lenski, *Major US healthcare labor shortages projected in every state by 2026, mental health professionals grow in high demand, Mercer report shows Mercer* (2021), https://www.mercer.com/newsroom/us-projected-to-have-major-healthcare-labor-shortages-in-every-state-mental-health-professionals-grow-in-high-demand.html; Kris Mamula, *Staffing Woes Driving Western Pennsylvania Hospitals' Struggles with Costs,* Post-Gazette (Feb. 28, 2022), https://www.post-gazette.com/business/career-workplace/2022/02/28/western-pennsylvania-nursing-hospital-staffing-expenses-labor-shortgage-covid-19-salaries/stories/202202240158.

49 *Id.*

50 Kylie Logan, *Nursing salaries surge 4% to combat burnout and worker shortages*, Fortune (Nov. 19, 2021), www.fortune.com/2021/11/19/nursing-shortage-salary-increases-average-pay/.

51 Lenski, *supra.*

But the agencies still face several important hurdles in using labor markets as the basis for challenging a healthcare merger. First, defining labor markets geographically is far from straightforward, particularly in healthcare, where a "one size fits all" approach is unlikely to succeed. For example, even if the markets from which hospitals draw patients are relatively narrow, the area from which those same hospitals draw labor, particularly nurses, may be much broader.

Second, regional (or even nationwide) effects may swamp any potential local harm to labor from the merger as nurses now come not only from a hospital's local areas, but through travel-nurse agencies that recruit nationwide. The demand for travel nurses exploded during the pandemic with about 30,000 open positions for travel nurses nationwide in 2021.[52] This phenomenon is fueled by wages: travel nurses can make up to 10 times their salaries compared with local employment options.[53] The constraints from both the nursing shortage and attractiveness of travel nursing positions have forced hospital executives to increase staff nurse salaries, and also to take more qualitative steps to attract and retain staff. For example, hospitals are offering non-traditional monetary perks (e.g. sign-on bonuses) and non-monetary benefits (e.g. scheduling flexibility) to recruit and retain staff.[54]

Third, on the "product market" dimension, healthcare labor markets may not be limited simply to the merging parties and their direct competitors. For example, in a hospital merger, the labor market may need to be more broadly construed than simply hospital-based nursing jobs to include a wide range of alternative roles, such as home healthcare, hospice nursing, specialist nursing facilities, nursing homes, physicians' offices, and other nursing positions. In fact, there may be a very broad range of healthcare roles to which a hospital nurse may choose to switch should wages or other conditions of employment change post-merger.

Fourth, reductions in labor costs may still be creditable efficiencies from a merger. Although the Supreme Court has never endorsed an efficiencies "defense" that would allow an otherwise anticompetitive merger to proceed, and lower courts have typically either set an impossibly high threshold or given efficiencies little credit,[55] the agencies have traditionally considered efficiencies arguments in a merger investigation.[56] Consistent with the current Merger Guidelines, the Third Circuit outlined a four-part test for a cognizable efficiencies defense in its recent decision affirming the FTC's successful challenge of Hackensack Meridian's acquisition of Englewood Health:

> For the efficiencies defense to be cognizable, the efficiencies must (1) "offset anticompetitive concerns in highly concentrated markets"; (2) "be merger-specific" (i.e. the efficiencies cannot be achieved by either party alone); (3) "be verifiable, not speculative"; and (4) "not arise from anticompetitive reductions in output or service."[57]

Under the last factor, merging parties must show that reduced headcount or elimination of duplicative employment positions would lower costs but not as a result of lost competition for employees. But the reality is that most hospital mergers would not be expected to reduce demand for nurses because, absent strong evidence that a merger will result in reduced output, the number of patients, procedures, and nurse-focused tasks should remain the same, if not increase, following many hospital combinations. Still, merging parties should expect FTC or DOJ staff to probe whether any labor cost savings result from lost competition for upstream supply of employees.

52 Alexandre Tanzi, *U.S. Travel Nurses Are Being Offered as Much as $8,000 a Week*, Bloomberg (Aug. 31, 2021), https://www.bloomberg.com/news/articles/2021-08-31/there-s-a-market-for-8k-a-week-nurses-in-u-s-as-delta-spreads#:~:text=There%20are%20about%2030%2C000%20open,a%20health%2Dcare%20staffing%20firm.

53 Leticia Miranda, *Rural Hospitals Losing Hundreds of Staff to High-Paid Traveling Nurse Jobs*, NBC News (Sept. 15, 2021), https://www.nbcnews.com/business/business-news/rural-hospitals-losing-hundreds-staff-high-paid-traveling-nurse-jobs-n1279199.

54 Blake Farmer, *Worn-Out Nurses Hit the Road for Better Pay, Stressing Hospital Budgets — and Morale*, NPR (Oct. 20, 2021), https://www.npr.org/sections/health-shots/2021/10/20/1046131313/worn-out-nurses-hit-the-road-for-better-pay-stressing-hospital-budgets-and-moral; Sam Campbell, *How flexible scheduling in healthcare benefits staff, patients, and organizational outcomes*, When I Work (July 29, 2020), https://wheniwork.com/blog/flexible-scheduling-in-healthcare.

55 "Contrary to endorsing such a defense, the Supreme Court has instead . . . cast doubt on its availability." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016); *see also* Penn State, 838 F.3d at 327 ("Because we conclude that the Hospitals cannot show that their claimed efficiencies will offset any anticompetitive effects of the merger, we need not decide whether to adopt or reject the efficiencies defense.").

56 Deborah Feinstein, Former Director of the FTC Bureau of Competition, noted in 2017, that the FTC "routinely consider[s] efficiency arguments, especially with respect to quality improvement claims" and that "the FTC does decide not to pursue cases based on [its] assessment of these claims" during the investigation phase. Deborah Feinstein, To Know Where You're Going, Look at Where You've Been, AAI Healthcare Roundtable: Competition and Healthcare – Enforcement and Policy Priorities, Washington, D.C. (Feb. 22, 2017), https://www.ftc.gov/system/files/documents/public_statements/1120623/feinstein_aai_speech_2-22-17.pdf . The 2010 FTC and DOJ Horizontal Merger Guidelines issued by the FTC and DOJ acknowledged efficiencies as a potential defense in horizontal mergers, but those Guidelines have now been withdrawn by both agencies. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), ftc.gov/os/2010/08/100819hmg.pdf.

57 *FTC v. Hackensack Meridian Health and Englewood Healthcare Foundation*, 21-2603 (3d Circuit Oct. 29, 2021) (quoting *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348-349 (3d Cir. 2016)) (citation omitted).

Fifth, economic models such as those described above may be vulnerable to attack or distinguishable from the specific facts of a hospital merger for the reasons noted as well as others. Among other things, they rely on assumptions about travel distances that may not apply to healthcare workers. They also face limitations based on the available data, which may have led to biased or misleading results.

Finally, external forces may prevent any attempted reduction in wages or non-monetary benefits or perks following a healthcare deal. Galvanized by concerns with safety, pay, and staffing shortages in hospitals, nurses are increasingly turning to union membership for help.[58] Nurses have taken action over pay and staffing issues, with multiple healthcare strikes across the country in 2021.[59] Already facing nursing staffing shortages, nurses' unions can provide further constraints on merging hospitals that might seek to lower wages or reduce non-monetary benefits.

Merging parties should factor these labor market concerns and potential strategies into their merger plans, both in their advocacy before the agencies and potential contingencies for a court challenge.

58 Kathleen Gaines, *Should I Join a Nurses Union? Pros and Cons*, Nurse.org (Jan. 20, 2022), https://nurse.org/articles/pros-and-cons-nursing-unions/. Nursing membership was 20 percent in 2021. *Id.*

59 Most notably a 10-month strike at Tenet Healthcare-owned St. Vincent Hospital in Massachusetts, resulting in a new contract that increased wages. Dave Muoio, *Nurses Vote to End 10-Month Strike at Tenet Healthcare's St. Vincent Hospital*, Fierce Healthcare (Jan. 4, 2022), https://www.fiercehealthcare.com/hospitals/nurses-strike-tenet-healthcare-st-vincent-hospital-vote-to-end-10-month-strike-at-tenet#:~:text=Vincent%20Hospital,-By%20Dave%20Muoio&text=Nurses%20at%20Tenet%20Healthcare%2Downed,-from%20the%20Massachusetts%20Nursing%20Association.

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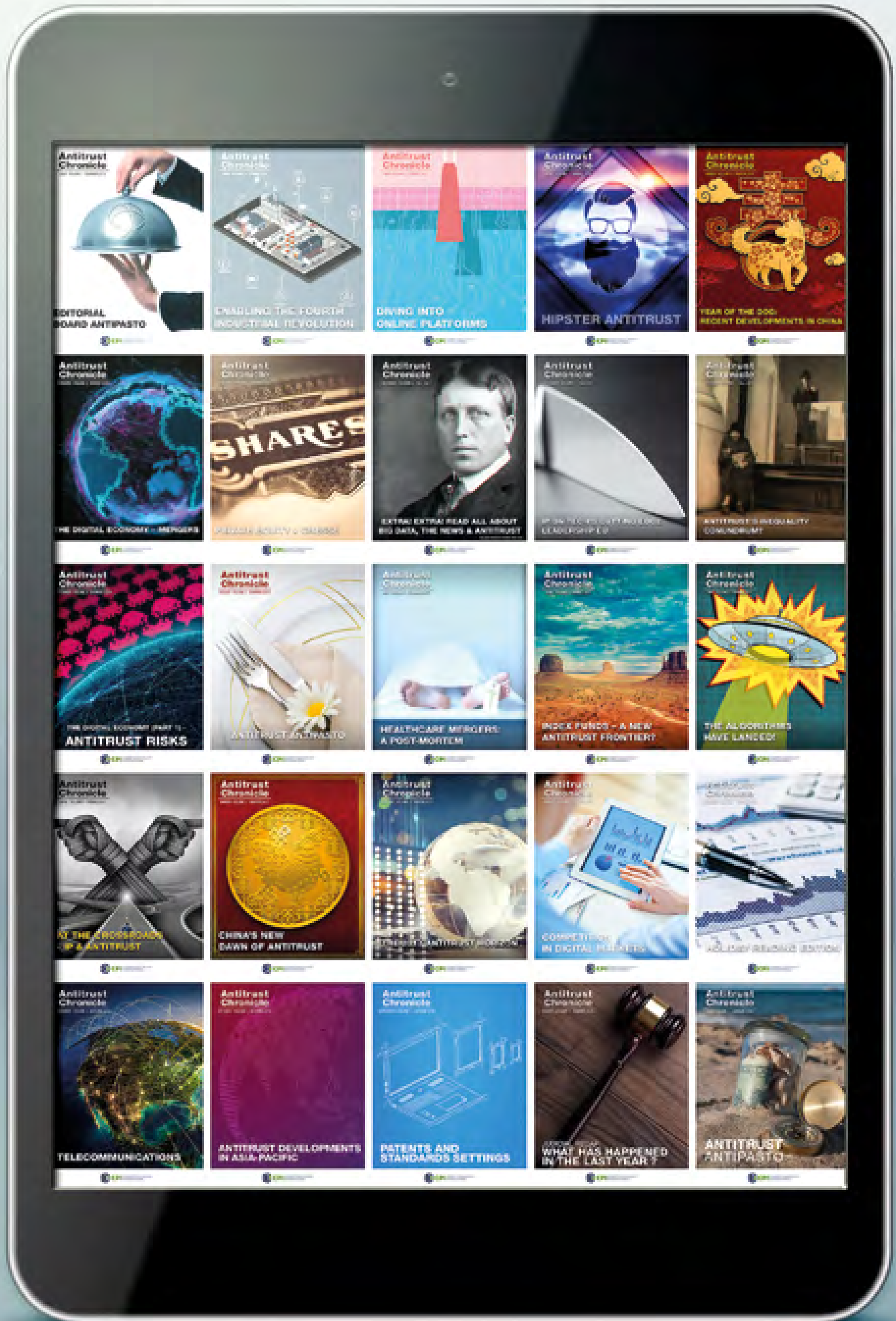

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