Antitrust Challenges to Nonprofit Hospital Mergers Under Section 7 of the Clayton Act

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Comment

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I. INTRODUCTION

Prior to the early 1970s, there was almost no significant antitrust litigation in the health care industry.1 Over the last two decades, however, the $2402 billion hospital industry has experienced rapid

1. See e.g., Nickles and Brown, Hospital Care Confronts Antitrust, 8 HEALTH CARE MGMT. REV. 39 (1983); Starkweather, Hospital Mergers in the Making, HEALTH ADMINISTRATION PRESS (1981).
consolidation. The marked increase in merger activity has triggered a dramatic rise in hospital antitrust litigation. Despite this increase, until recently, every federal antitrust challenge under Section 7 of the Clayton Act has attacked investor-owned, for-profit hospital mergers. The potential exposure of nonprofit hospital mergers to antitrust challenges is significant because nonprofits constitute the majority of all nongovernmental institutions.

Two pairs of district and circuit court decisions considered for the first time whether nonprofit hospitals are within the reach of Section 7 of the Clayton Act. In United States v. Rockford Memorial Corp., the District Court for the Northern District of Illinois sustained the government’s Section 7 challenge to the proposed merger of two nonprofit hospitals. On appeal, the Court of Appeals for the Seventh Circuit affirmed, but instead of applying Section 7 of Clayton Act, the court held that the proposed merger violated Section 1 of the Sherman Act. Ten days before the district court’s decision in Rockford, in United States v. Carilion Health System, the District Court for the Western District of Virginia had rejected the application of Section 7, instead holding the merger not in violation of Section 1 of the Sherman Antitrust Act. On appeal, the Fourth Circuit affirmed.

This Note first provides an overview of competing policy objec-


4. In the early 1960s, only about five hospital mergers occurred each year. Starkweather, supra note 1. During the next decade, however, there was an average of about fifty consolidations per year. Id.


7. Id.


10. United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir. 1990). Although the Seventh Circuit affirmed on grounds other than Section 7, the court, in dicta, observed that the Government “amazingly” failed to make an argument at trial that would bring the merger within one of Section 7’s two jurisdictional clauses.


tives that inform antitrust analysis. The Note then discusses relevant Section 7 precedent, in particular, the evolution of Section 7's two jurisdictional clauses, the "stock" clause and the "assets" clause. Because the district court and the court of appeals in Rockford each made arguments for the application of the "stock" and "assets" clause respectively, they provide a context to discuss the application of both jurisdictional clauses to a nonprofit merger transaction. After setting forth the reasoning of the district court and court of appeals decisions, the Note then critically analyzes each decision, asserting that neither jurisdictional clause covers nonprofit hospital mergers. Finally, this Note concludes that Section 1 of the Sherman Act is the proper provision to attack nonprofit hospital mergers.

II. BACKGROUND

A. Antitrust Policy Objectives and Substantive Rules

An examination of the enforcement of the antitrust laws reveals a tension between two competing sets of values. The Jeffersonian school holds that the objectives of antitrust policy should reflect important social and political concerns. Paramount to this view is the preservation of decentralized economic and political power as well as the equitable distribution of wealth among owners who are accountable to the local community. At the other end of the

13. See e.g., R. BORK, THE ANTITRUST PARADOX 50-71 (1978). The author observes that disagreement over the objectives of antitrust law precludes formation of coherent enforcement rules. Id.
14. See e.g., Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1187-88 (1981) (proposing that in antitrust merger cases, the decentralizedization of economic and political power is valuable in its own right); Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051 (1979) (commenting that it is "bad history, bad policy, and bad law" to exclude political ideals in the formation of antitrust policy); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); Flynn, Reaganomics and Antitrust Enforcement: A Jurisprudential Critique, 1983 UTAH L. REV. 269, 280 (1983) (urging that consideration be given to all competing interests and criticizing the economic approach to antitrust enforcement as reductionist).
15. Populist concerns are reflected in the early development of the antitrust laws. See e.g. 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 58 (1978) reprinting President Grover Cleveland's State of the Union Address delivered on December 3, 1888, just before the Sherman Act was enacted ("As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and servants of the people, are fast becoming the people's masters."). Other commentators have observed that, under the Jeffersonian ideal, the economy would consist of:

small, local, responsible, and individually-owned enterprises . . . contrasted with
spectrum is the Hamiltonian view, which holds that the efficient allocation of resources should be the singular objective of antitrust policy. The virtue of this view lies in the availability of economic theory as a foundation for the rules that will serve antitrust objectives. At best, the implementation of economic rules that protect competition in the marketplace also may serve social and political objectives. But the more persuasive argument for the use of economic tools of analysis is pragmatic. Economic theory provides greater certainty in application than a standard that weighs numerous and immeasurable social and political objectives and then attempts to translate them into antitrust rules.

In antitrust merger cases, economic theory is used to fashion rules to protect competition in the marketplace. The principal threat to competition is collusion among firms in the same mar-

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1 P. Areeda & D. Turner, Antitrust Law § 109 at 22-23 (1978) (characterizing the Jeffersonian view, which the authors find inconsistent with a modern, pluralistic society).

16. See e.g., R. Bork, supra note 13, at 50-71 (concluding that "the conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare.") Id. at 71; R. Posner, Antitrust Law: An Economic Perspective 20 (1976). (stating that "although noneconomic objectives are frequently mentioned in the legislative histories, it seems that the dominant legislative intent has been to promote some approximation to the economist's idea of competition, viewed as a means toward the end of maximizing efficiency").

17. See e.g., Baker & Blumenthal, The 1982 Guidelines and Preexisting Law, 71 Calif. L. Rev. 311, 319 (1983) (observing that "[e]conomics has provided [antitrust] decisionmakers with an accessible intellectual calculus often leading to relatively clear results. Sociology and political science, in contrast, have provided only generalities that are difficult to weigh when making enforcement decisions").

18. Some commentators acknowledge the presence of political and social concerns in the legislative history of the antitrust laws, but believe Congress intended to meet such concerns by implementing economic standards that would preserve competition and indirectly serve other objectives. 4 P. Areeda & D. Turner, supra note 15, ¶ 904.


20. 4 Areeda & Turner, supra note 15, ¶ 904, at 13 (emphasizing the value of economic theory by pointing out the lack of social and economic theory sufficient to allow evaluation of potential merger consequences); R. Posner, supra note 16, at 18 (casting doubt on the validity as well as the measurement of sociopolitical objections to monopoly).

21. An important distinction observed by the Supreme Court is that the antitrust laws were intended to protect competition, as opposed to individual competitors in the market. Brown Shoe Co. v. United States, 370 U.S. 294, 319-20 (1962); See generally R. Posner, supra note 16, at 96-134 (explaining the role of economics in fashioning rules to preserve competition in the marketplace and govern horizontal mergers).
When firms collude to set prices and output limits, their collective efforts resemble those of a monopolist. Because a monopolist will maximize profits by restricting output and setting price above the competitive level, economic inefficiency results when this strategy causes people to either forego consumption choices or pay more than a competitive price.

The prevention of collusive behavior is the primary goal of Section 7 of the Clayton Act. Although a variety of tests have been employed to detect the likelihood of collusion, a basic premise underlying economic analysis is that collusion becomes more likely when the number of firms competing in the market decreases. Because market shares can be objectively determined, market concentration can be useful in predicting collusive behavior.

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23. See generally H. Hovenkamp, supra note 22, at 92-110 (discussing express and tacit collusion among market participants).

24. See generally id. at 1-36 (illustrating the benefit the monopolist enjoys from restricting output and increasing price); R. Posner, supra note 16, at 8-22, 237-55 (explaining why a monopolist will maximize profits by lowering output and raising price and commenting upon the net cost to society of such behavior).

25. See supra note 21 and accompanying text. The economic analysis of concentrated, or oligopolistic markets, demonstrates that the social costs of explicit or tacit collusion are even greater than the social costs imposed by monopoly behavior. See R. Posner, supra note 16, at 51 (citing as two costs that must be borne by members of a colluding group the “costs of arriving at a common price above the competitive price level and costs of preventing chiseling of the agreed-upon price by members of the group”). Id. Both these costs yield no benefit to society but serve to reduce the net benefit from collusive behavior.

26. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (citing congressional concern that excessive numbers of mergers would create a “rising tide of economic concentration” that would create conditions ripe for collusive behavior).

27. Compare United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (emphasizing that congressional concern over undue market concentration permits the Court to avoid considering detailed proof of market structure) with Report of the Attorney General's National Committee to Study the Antitrust Law 125-27 (1955) (citing an elaborate and detailed number of factors that could be considered by a court in assessing the effect of a proposed merger upon competition).

28. See supra note 23 and accompanying text.

29. Commentators and courts alike have observed that a standard of illegality based upon market concentration can serve antitrust objectives, enhance predictability, and simplify administration. See e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963) in which the Court warned of “the danger of subverting congressional intent by permitting a too-broad economic investigation” and stated that “in any case in which it is possible . . . to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.” Id.; Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 278-79 (1960) (observing
Any such prediction of collusive behavior, however, is only as strong as the linkage between market concentration and collusion. The potential frailties of this linkage led one proponent of economic analysis to caution that:

Between economics and law lies a broad area of uncertainty that must be looked at squarely and dealt with in some rational manner. To insist that we understand matters of which we are truly ignorant can only lead to erratic, controverted decisions and to opinions which lack that reasoned logic on which respect for law depends. Dismissed with quick assertions, these troublesome questions may fail to evoke the continued inquiry which they deserve, so that mistaken notions may persist, entombed in the law, beyond the day when fresher doctrines could lay them suitably to rest.\(^3\)

The acknowledged limitations of current economic models suggest that their use be tempered with the understanding that circumstances and developments may weaken the linkage between market concentration and collusion. As discussed in Part IV, management and ownership qualities unique to nonprofit organizations may render invalid traditional antitrust behavioral assumptions. Departures from a market concentration analysis are justified when the presence of an unusual characteristic defeats an inference of collusion in a particular instance.\(^3\)

**B. Application of Section 7 of the Clayton Act**

1. The Incipiency Doctrine

Section 1 of the Sherman Antitrust Act\(^3\) and Section 7 of the Clayton Act\(^3\) are the primary provisions available to the govern-

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31. *Id.* at 283.
32. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Antitrust Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.*
33. Section 7 appears at 15 U.S.C. § 18 (1988), and provides in pertinent part:
   No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.
ment to prevent anticompetitive business combinations. The statutes differ in important respects. The Clayton Act requires the court to predict whether the effect of the merger "may be substantially to lessen competition." The Sherman Act, however, requires no such prediction and is violated only when the government has shown an existing, actual restraint of trade.

The historical development of Section 7 of the Clayton Act provides important insights to understanding the significance of distinctions between the application of standards of liability under the two statutes. The Senate debates indicate that the words "may be" were substituted for "is" to make the relevant clause read "where the effect of such acquisition may be [substantially to lessen competition]." The language in Section 7 that prohibits acquisitions when the effect "may be" substantially to lessen competition or "tend to" monopoly consistently has been interpreted as intended to prevent potentially anticompetitive combinations in their incipiency. The language of the Clayton Act stands in contrast to Section 1 of the Sherman Act, which prohibits agreements that are in restraint of trade. Congress intended the standard of proof under Section 7 to be less burdensome than under Section 1 due to dissatisfaction with court interpretations under the Sherman Act.

More than mere injury stemming from lessened competition, however, must be shown to recover damages under Section 7. The Supreme Court decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* illustrates the prophylactic role of Section 7 and the burden of proof required to establish a claim for damages. There, the plaintiffs alleged injury flowing from Brunswick's acquisitions of failing bowling centers that had defaulted on payments owed to

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34. *Id.* See also Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) (interpreting the Clayton Act language as intended to prevent anticompetitive activity before it occurs or in its "incipiency").

35. See *supra* note 32 and accompanying text.

36. *Brown Shoe Co.,* 370 U.S. at 317 (citing 51 Cong. Rec. 15818, 15936-37 (1914) (Statement of Senator Chilton)).


38. See S. Rep. No. 1775, 61st Cong. 2d Sess. 4-6 (1914):

The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding . . . . The concept of reasonable probability conveyed by these words ["may be"] is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.

Brunswick for bowling equipment. The plaintiffs' novel damage theory was that if Brunswick merely had allowed the failing centers to close, the plaintiffs' profits would have increased. The court below found for the plaintiff and awarded treble damages. Brunswick appealed on the issue of damages but did not challenge the lower court's finding that its acquisitions were unlawful under Section 7.

The Court granted certiorari to examine the narrow issue of damages when the only injury alleged was the denial of an anticipated share of a future market. The Court's opinion highlighted the basic Section 7 question of whether the effect of an acquisition "may be substantially to lessen competition." Supreme Court precedent had established that "[t]he grand design of [Section 7] was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach," and that actual restraints on trade need not be proven.

In Brunswick, however, the Court held that a mere violation of

40. Id. at 479. Specifically, plaintiffs alleged that the acquisitions might lessen competition or tend to create a monopoly in violation of Section 7. Id. at 480.
41. Id. at 479-80.
42. Id. at 484.

Broadly stated, the bill, in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [Sherman Act]... and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.

Id.

Despite these apparent differences in the plain meaning of the statutes, their respective legislative histories and court interpretations, and acceptance thereof by distinguished commentators on antitrust law, see e.g., 5 E. KINTNER, FEDERAL ANTITRUST LAW, § 39.14 (1984), some commentators have observed that the Sherman Act standard has, in practice, converged with the incipiency standard under Section 7 of the Clayton Act. See 2 P. AREEDA, ANTITRUST ANALYSIS, ¶ 304 (3rd ed. 1981) (The "substantial lessening of competition" language of the Clayton Act has "coalesced" with the Sherman Act standard of "unreasonable restraints on trade" into a single standard of liability).
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Section 7 would not support a damage claim because proof of a violation establishes only the *possibility* that injury may result.\(^{47}\) The Court agreed with plaintiffs that they may have suffered some kind of injury, but not one that antitrust law was designated to prevent. The loss of potential windfall profits as a result of decreased competition is not an injury forbidden by the antitrust laws.

2. Parties and Transactions Covered by Section 7

Section 1 of the Sherman Act has a broad jurisdictional reach that prohibits any agreement between any parties if the agreement is in restraint of trade.\(^{48}\) In contrast, no jurisdiction exists under Section 7 of the Clayton Act unless a person has acquired the stock of another, or a person subject to Federal Trade Commission ("FTC") jurisdiction has acquired the assets of another person.\(^{49}\)

Merger transactions do not fit neatly within either jurisdictional branch of Section 7.\(^{50}\) A merger is neither a pure stock\(^{51}\) nor a pure asset acquisition.\(^{52}\) Rather, mergers are a combination of

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\(^{47}\) *Brunswick*, 429 U.S. at 486.


\(^{49}\) *Id.* § 18.

\(^{50}\) United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 337 (1963). The Court found that the literal terms of the statute did not include a merger transaction and looked to the legislative history of the antitrust acts to determine congressional intent. *Id.*

\(^{51}\) According to *Philadelphia Nat'l Bank*, several of the more important distinctions between a merger and a stock acquisition include:

1. A merger transaction can be consummated upon the affirmative vote of the holders of only two-thirds of the outstanding stock each corporation, but in a stock acquisition, the acquiring company negotiates the purchase of stock held by each individual shareholder who could decide for himself whether to transfer his shares.

2. A merger requires public notice, whereas stock can be acquired privately.

3. A shareholder dissenting from a merger has the right to receive the appraised value of his shares; in contrast, no shareholder has a comparable right in a stock acquisition.

4. The corporate existence of a merged company is terminated by the merger, but remains unaffected by an acquisition of stock. *See id.* at 337 n.14.

\(^{52}\) Several features noted by the Court that distinguish a merger from a sale of assets include the following:

1. A merger involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's sold assets.

2. Shareholders of merging corporations surrender their interests in those corporations in exchange for different rights in the surviving corporation. In an asset acquisition,
both.53 Because mergers involve both stock and assets, the argument for jurisdiction under Section 7 would appear to be strongest when both the assets and stock clauses are operative. The assets clause only prevents a party subject to FTC jurisdiction from acquiring the assets of another and therefore is inoperative when the merger is between parties, such as banks, that are not subject to FTC jurisdiction. Absent the application of the assets clause, the issue is whether the stock clause standing alone confers jurisdiction over the merger.

In United States v. Philadelphia National Bank 54 the Supreme Court established that the stock clause is sufficient to attack merger transactions. Under the proposed merger agreement in Philadelphia National Bank, Girard Trust, one of the defendant banks, was to be merged into Philadelphia National Bank.55 By the terms of the agreement, shareholders of Girard Trust would surrender their stock in exchange for the stock in the consolidated bank.56 The defendant banks claimed that their merger transaction was not within the reach of the stock clause because the transfer of stock to Girard Trust shareholders was different than an acquisition of stock.57 The defendants also pointed to other distinctions between stock acquisitions and mergers to support their argument that the merger was not within the stock clause.58

The proposed merger was challenged, and in the Supreme Court, the justices traced the legislative history of Section 7 to determine whether the congressional design included merger transactions.59 The Court noted that until it was amended in 1950,60 however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred.

3. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights and obligations of the merging firms.

4. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel.

The Court observed that mergers are similar to stock acquisitions because, a merger, like a stock acquisition, involves the acquisition by one corporation of a voice in the management of the business of another corporation; no voice in the decisions of another is acquired by purchase of some part of its assets. See id. 336-37 n.13.

53. Id. at 337.

54. Id. at 342.

55. Id. at 331.

56. Id.

57. Id. at 337 n.14.

58. Id. See supra note 51 discussing the differences between a merger and a stock acquisition.


Section 7 expressly prohibited only acquisitions of stock or share capital. The statute contained no prohibition of the acquisition of assets. Therefore, before the amendment, neither the Sherman Act nor the Clayton Act had proven to be an effective weapon in attacking business combinations such as mergers or purchases of assets.

The Court also observed that in 1950, Congress responded to the perceived shortcomings of the existing statutes and enacted legislation intended to close the asset acquisition loophole. Relying upon the legislative intent manifested in this amendment, the Court interpreted the amended Section 7 as reaching not only asset acquisitions, but also merger transactions. The Court stated that “the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum.”

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[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Id.

62. For example, in United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Supreme Court held that the cash purchase by United States Steel Corporation of the physical assets of Consolidated Steel was not in violation of Section 1 of the Sherman Act. The Court’s holding raised doubts as to whether the Sherman Act was an effective check on pure asset acquisitions that were not within the coverage of the original Clayton Act.

The judiciary also had rejected the government’s Section 7 challenges to merger transactions. The Court’s literal interpretation of the “stock acquisition” language in the original Section 7 frustrated the government’s attempts to apply the statute to mergers that do not, strictly speaking, involve acquisitions of stock. See also Federal Trade Comm’n v. Western Meat Co., 272 U.S. 554 (1926); United States v. Celanese Corp. of Am., 91 F. Supp. 14 (S.D.N.Y. 1950).

63. Act of December 29, 1950 (Celler-Kefauver Antimerger Act), ch. 1184, 64 Stat. 1125-1126, 15 U.S.C. § 18. The pertinent portion of the amendment provided that “no corporation subject to jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another.” Id.

The Columbia Steel case often was cited by congressmen as a primary impetus to amendment of Section 7. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 10-11 (1950); Hearings before the Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong. Rec. 16453 (1950) (Senator Kefauver, Senate sponsor of the bill to amend Section 7, stated that “[t]he Columbia Steel Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act.”).


65. Id. at 342 (emphasis in original).
further stated that although the stock acquisition language in the new Section 7 was identical to the original statute, its new context justified expansion of the literal language to include merger transactions that involve a transfer, and not an acquisition, of the stock of the parties.\textsuperscript{66} The Court held that the amended stock acquisition clause was sufficient by itself to attack merger transactions without reference to the assets clause.\textsuperscript{67}

After \textit{Philadelphia National Bank}, the question remained whether a merger transaction not involving stock or share capital was within the reach of the stock clause. In \textit{United States v. Chelsea Savings Bank},\textsuperscript{68} a federal district court addressed the applicability of Section 7 to the merger of two nonstock mutual savings banks not subject to FTC jurisdiction.\textsuperscript{69} The court began with an interpretation of \textit{Philadelphia National Bank} that would appear to allow nonstock mergers to be reached by the stock clause.\textsuperscript{70} In this early portion of the opinion, the court acknowledged that the principal concern of Section 7 was the consolidation of economic power, and not the mechanics of the consolidation process.\textsuperscript{71} In the second portion of the opinion, the court discussed the similarities between the capital held by stock banks, like the banks in \textit{Philadelphia National Bank}, and the capital held by depositors in nonstock mutual savings banks such as those in \textit{Chelsea Savings Bank}.\textsuperscript{72} The court found that the depositors in a nonstock savings bank stood in the same relation to the bank as ordinary shareholders to a stock bank.\textsuperscript{73} This finding led the court to conclude that the depositor capital was share capital explicitly covered by the stock clause.\textsuperscript{74}

Finally, the \textit{Chelsea} court observed that when Congress enacted

\textsuperscript{66.} \textit{Id.} at 346.
\textsuperscript{67.} \textit{Id.}
\textsuperscript{68.} 300 F. Supp. 721 (D. Conn. 1969).
\textsuperscript{69.} \textit{Id.}
\textsuperscript{70.} \textit{Id.} at 723. Initially, the court's opinion rested upon a broad interpretation of \textit{Philadelphia Nat'l Bank}. The court noted that the Supreme Court's rationale need not be restricted to amalgamations of banks that issue stock. The court stated that the principal concern of the Supreme Court primarily was the effect of a merger in consolidating the economic power of two corporations, rather than with the procedure through which the consolidation of power took place. \textit{Id.}
\textsuperscript{71.} \textit{Id.}
\textsuperscript{72.} \textit{Id.} The court observed that under Connecticut law, the depositors of a mutual savings bank have incidents of ownership that are like those held by shareholders of a stock bank. For example, like shareholders, the depositors can receive dividends, may be divided into classes of ownership, and upon liquidation, take a ratabile share in the assets remaining after satisfaction of claims.
\textsuperscript{73.} \textit{Id.}
\textsuperscript{74.} \textit{Id.}
the Bank Merger Act, it expressly included consolidations of mutual savings banks within the reach of Section 7. Therefore, as the final ground cited for its decision to apply the stock clause, the court rested, not just upon an expansive reading of Philadelphia National Bank, but instead upon an explicit statutory provision that precisely reached the transaction faced by the court.75

Although Chelsea Savings Bank expanded the Philadelphia National Bank holding to mergers of two nonstock privately-owned banks, it left unresolved the question of whether the stock clause could reach a merger of nonprofit institutions.76 In United States v. Carilion Health System,77 two nonprofit, nonstock hospitals proposed to merge in order to consolidate services and utilize excess capacity held by one of the defendant hospitals.78 The Government sought to enjoin the proposed merger under Section 1 of the Sherman Act and Section 7 of the Clayton Act, asserting that the combination would lessen competition in the relevant hospital market.79

In a motion for summary judgment against the Government’s Section 7 claim, the defendants argued that the stock clause could not reach their merger transaction because both defendants were nonstock, nonprofit organizations.80 The court agreed with the defendants’ contention that the Government did not have jurisdiction to attack a merger of nonprofit hospitals under Section 7 of the Clayton Act,81 concluding that Section 7’s stock clause was not triggered by mergers between nonprofits that have no private owners and that are prohibited from issuing stock or share capital.82 The Carilion court reasoned that the plain language of the statute did not grant jurisdiction to attack mergers of nonprofit hospitals

75. Id. at 724.
76. Several commentators have noted the lack of precedent on the applicability of Section 7 to nonprofit hospital mergers. See e.g., Miles, Hospital Mergers and the Antitrust Laws: An Overview, 29 ANTITRUST BULL. 253, 260 (1984); Miles and Philp, Hospitals Caught in the Antitrust Net: An Overview, 24 DUQ. L. REV. 489, 664 (1985).
78. Id. at 845.
79. Id. at 841. More specifically, the Government claimed that the proposed union would eliminate competition between the defendants and lessen competition in the acute inpatient service market. Id. For a discussion of the process and considerations involved in the selection of the relevant geographic and product market in hospital antitrust litigation see Klingensmith, Applying Antitrust Concepts to Acute Care Hospital Industry: Defining the Relevant Market for Hospital Services, 13 J. HEALTH POL’YS, POL’Y & L. 153 (1988).
81. Id.
82. Id.
that do not issue stock or share capital. After granting the defendants' motion for summary judgment, the case went to trial on the remaining count, which alleged an unreasonable restraint on trade in violation of Section 1 of the Sherman Antitrust Act. The jury found that the planned affiliation would not be in unreasonable restraint on trade.

In Carilion, the Government argued that Section 7's stock clause could be applied to prevent a merger of a nonstock nonprofit hospital. The court was not presented with the argument that the assets clause might operate to prevent a merger of nonprofit hospitals where an absence of stock would preclude use of the stock clause. Because nonprofit entities are not within the jurisdiction of the FTC under the Federal Trade Commission Act, at first blush, it would appear obvious that Section 7's "assets subject to FTC jurisdiction" clause is inoperative in such an instance.

Section 5 of the Federal Trade Commission Act, however, does confer jurisdiction upon the Commission over a corporations organized for its "own profit or that of its members." The distinction between nonprofits, which are excluded from the FTC Act, and a corporation organized for the profit of its members was addressed in Community Blood Bank v. FTC. There, the defendants raised the issue of FTC jurisdiction on appeal from an FTC cease and desist order issued to prevent nonprofit hospitals and affiliates from engaging in practices that allegedly restrained the growth of two commercial blood banks in the vicinity of Kansas City. After concluding that the term "profit" embraced its "traditional and generally accepted meaning," the court examined the

83. Id. The court stated that the stock clause is worded to address only acquisitions of stock or an interest equivalent to stock. The court concluded that, because Community [the hospital] has no private owners and is prohibited under law from issuing stock, the stock clause did not reach the proposed merger. Id.


86. Id. at 842.

87. Act of Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, 15 U.S.C. §§ 41-58 (1988). In pertinent part, the Act prohibits "unfair methods of competition," id. at § 45(a)(1), among parties subject to its jurisdiction which includes corporations defined as "any company ... incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." Id. at § 44.

88. Id. § 44.

89. Id.

90. 405 F.2d 1011 (8th Cir. 1969).

91. Id. at 1017.
legislative history of the original FTC Act\textsuperscript{92} and observed that, although Congress intended to exclude some nonprofits from the FTC's jurisdiction, it "did not intend to provide a blanket exclusion of all nonprofit corporations, for it was also aware that corporations ostensibly organized as not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members."\textsuperscript{93} The court first distinguished cases in which the nonprofit association merely is a conduit for its members' pecuniary benefit\textsuperscript{94} from a nonprofit that is not a "device" or "instrumentality," but rather, devotes any income to the benevolent purposes of the organization. The court then concluded that the FTC Act did not reach nonprofit corporations such as the defendants in Community who were organized for charitable purposes and distributed no assets or earnings to the benefit of any member or individual.\textsuperscript{95} Accordingly, the court set aside the FTC's cease and desist order.

To date, no court has held that FTC jurisdiction extends to eleemosynary institutions such as the defendants in Community. However, in denying a petition to quash an investigatory subpoena, the FTC ruled in Adventist Health System that the Commission has jurisdiction over all nonprofits to investigate and enforce Section 7.\textsuperscript{96} The ruling was couched in the agency's general policy of treating substantive defenses, such as jurisdictional challenges, as premature if made to an investigatory subpoena.\textsuperscript{97} The FTC rejected the challenge to the subpoena resting its decision, not upon an interpretation of FTC jurisdiction over Section 5 of the FTC Act,\textsuperscript{98} but rather upon Section 11 of the Clayton Act, which grants the Commission power to enforce various Clayton Act prohibitions.\textsuperscript{99} Section 11 distributes enforcement power among several govern-

\begin{footnotesize}
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\item 92. The court cited H.R. Rep. No. 533, 63d Cong., 2d Sess. (1914); S.R. No. 597, 63d Cong., 2d Sess. (1914); H.R. No. 1142, 63d Cong. 2d Sess. (1914).
\item 93. Community, 405 F.2d at 1017.
\item 94. See e.g., AMA v. FTC, 638 F.2d 443 (2d Cir. 1980), aff'd, by an equally divided Court, 455 U.S. 676 (1982); FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976); FTC v. Cement Institute, 333 U.S. 683 (1948).
\item 95. Community, 405 F.2d at 1019.
\item 96. Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 22,658 (FTC 1989).
\item 97. Id. The ruling explained: "[O]nly if the Petition clearly demonstrates that the Commission jurisdiction is improper will the Commission grant a motion to quash on jurisdictional grounds." Id. at 22,347.
\item 99. Id. § 21. Section 11 delineates which federal agencies are to enforce Clayton Act prohibitions in certain regulated industries and grants authority "in the Federal Trade Commission where applicable to all other character of commerce." Id.
\end{itemize}
\end{footnotesize}
ment agencies in charge of specialized, regulated industries. For example, the Federal Reserve Board polices the banking industry. Section 11 also grants the FTC authority to enforce the Clayton Act outside the regulated sectors, “where applicable to all other character of commerce.” The FTC ruling in *Adventist Health System* treated Section 11 of the Clayton Act as a grant of jurisdiction independent of, and with a reach greater than that in Section 5 of the FTC Act, which does not include nonprofits. Should this interpretation be accepted by the courts, it arguably would bring nonstock, nonprofit merger transactions within the reach of Section 7’s asset clause.

III. United States v. Rockford Memorial Hospital

A. Factual Background

Ten days after the *Carilion* decision, the issue of whether nonstock, nonprofit hospital mergers could be reached by the stock clause was addressed again in *United States v. Rockford Memorial Corp.* The *Rockford* decision dealt with an agreement between the defendants Rockford Memorial Corporation and SwedishAmerican Corporation under which each party agreed to form a new corporation into which the two defendant corporations would be consolidated. The Government filed a complaint asking the court to enjoin the merger and declare the proposed transaction in violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act. Defendants agreed to postpone the consolidation.

100. *Id.*
103. 15 U.S.C. § 18 (1988). The plaintiff in a Section 7 proceeding must prove three statutory elements. The statute requires a showing that there is likely to be a substantial lessening of competition in the relevant line of commerce in the relevant geographical area. *Id.*

The line of commerce element requires the court to define the product market in which competition is allegedly lessened. In *Brown Shoe Co. v. United States*, the Supreme Court defined the relevant product market: “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . . . With this broad market well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.” 370 U.S. 294, 325 (1962). The *Rockford* court found that the relevant product market was “acute hospital inpatient care.” *Rockford*, 717 F. Supp. at 1258-61.

The relevant geographical area or relevant “section of the country” should be defined as the area “within the competitive overlap [where] the effect of the merger on competition will be direct and immediate.” *Rockford*, 717 F. Supp. at 1261-78.

pending the outcome of the Government's motion for a preliminary injunction. The parties further agreed to consolidate the preliminary injunction hearing with a trial on the merits.

The defendant hospitals moved to dismiss the Government's Clayton Act count, claiming that the Government did not have jurisdiction to prevent the proposed merger under Section 7 of the Act. The defendants contended that neither of the two prohibitions of Section 7 applied to the planned merger of the two nonprofit hospitals. They reasoned that the stock or share capital clause was inapplicable because nonprofits have neither stock nor share capital and therefore could not acquire or transfer either in the planned consolidation transaction. In addition, because FTC jurisdiction does not reach nonprofit hospitals, the defendants asserted that the assets clause was also inapplicable to a merger between nonprofit hospitals.

B. Holding and Reasoning

The Rockford district court [hereinafter "Rockford court"] rejected the defendants' motion to dismiss for lack of jurisdiction and proceeded to sustain the Government's Section 7 attack on the consolidation. On appeal, the Seventh Circuit chose not to stretch the stock clause to cover nonstock nonprofits, but resting on findings made by the district court, found sufficient evidence to enjoin the merger under Section 1 of the Sherman Act.

1. The District Court Decision

The district court's decision to deny the defendants' motion to dismiss the Government's Section 7 claim rested heavily upon its interpretation of the Supreme Court's decision in United States v. Philadelphia National Bank. The court began by framing the issue before the Philadelphia National Bank Court as whether Sec-

105. Id.
106. Id.
107. Id.
108. Id. at 1253.
109. Id.
110. 15 U.S.C. § 44 (1988) defines the corporations within the reach of the FTC to include only an entity "organized to carry on business for its own profit or that of its members." Id.
112. Id. at 1258.
113. United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir. 1990).
tion 7, as amended, was applicable to a merger of two entities outside the jurisdiction of the FTC. The court noted that Philadelphia National Bank established that Section 7 covers the "entire amalgamation of corporate mergers, from pure stock acquisitions to everything up to, but not including . . . pure asset acquisitions [by entities not subject to FTC jurisdiction]."

Applying this rule to the planned merger of the two nonprofit hospitals, the court rejected the defendants' argument that the "stock acquisition" provision applies only to consolidations accomplished through the acquisition of stock or share capital. The Rockford court found that Congress and the Supreme Court had eliminated any distinction between an acquisition of control accomplished by a stock purchase and that accomplished by a merger agreement; therefore, the defendants' proposed merger was subject to Section 7 despite the absence of stock or share capital. The court found further support for the application of Section 7 to a nonstock entity in Chelsea Savings Bank, holding that the merger of two nonstock mutual savings banks was subject to the "stock or share capital" clause. Chelsea Savings Bank found no reason to limit the rationale of Philadelphia National Bank only to banks that issue stock.

The Rockford court rejected the defendants' assertion that the second portion of the Chelsea Savings Bank opinion rested upon the practical equivalence of depositor capital and share capital, concluding that Chelsea "demonstrates the foolishness of requiring an exchange of stock to trigger Section 7 . . . . and that the ethereal manifestations of ownership are unimportant for anti-trust purposes." The Rockford court summarized the precedent as having established that Section 7 reaches mergers without qualification regardless of the form of the transaction or "the existence of a stock transfer or lack thereof."

Once the Rockford court decided that Section 7 could reach nonprofit hospitals mergers, it considered the question of whether the effect of the planned consolidation "may be substantially to

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116. Id. at 1254.
117. Id.
118. Id. at 1255.
120. Id. at 723.
122. Id.
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lessen competition, or tend to create a monopoly." The court
determined that the relevant market would become markedly more
concentrated by reason of the merger. In addition, the court
also found that barriers to entry in the hospital acute care market
and the presence of vigorous competition among market hospitals
in the relevant market created an environment in which a hospital
"could benefit from anticompetitive activity."

After finding that the hospitals in the relevant market might
have incentive to engage in anticompetitive activity, the court ad-
dressed the defendants' argument that the operators of a nonprofit
institution, unlike the owners of a for-profit company, have no in-
centive to engage in anticompetitive tactics that might injure cus-
tomers. The defendants' argument was premised on the notion
that because a nonprofit does not have any owners and must rein-
vest any excess revenues over expenses, the decision-makers
have no opportunity to share in the firm's surplus and therefore
have no incentive to engage in anticompetitive tactics that might
injure their consumers.

The Rockford court rejected the defendants' argument for sev-
eral reasons. First, the court cited precedent to demonstrate how a
nonprofit entity might engage in anticompetitive conduct and
then discussed an analogous instance of such conduct among the
defendant hospitals. The court accused the defendants of colluding
with another area hospital in order to prevent Chicago Blue Cross,
a third-party payor, from contracting with the hospitals at a reim-

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123. Id. at 1281-87.
124. Id. at 1279-81.
125. Id. at 1281-83. (discussing barriers to entry such as the requirement a potential
entrant obtain a certificate of need and recent developments increasing level of competi-
tion in acute care inpatient market).
126. Id. at 1284.
127. Id.
128. Id. The Rockford court cited United States v. North Dakota Hosp. Ass'n, 640 F.
Supp. 1028 (D.N.D. 1986) in which a party contracting with area hospitals for health
care services was denied its request for a price discount. Id. The North Dakota Hospital
court found that the collective agreement among the hospitals to resist the efforts of a
purchaser to receive discounts constituted a violation of Section 1 of the Sherman Act.
Id. at 1038. The court distinguished the price fixing motive of the nonprofit hospitals
from the typical purpose of profit maximization. Contrary to a profit maximizing motive,
the court found that "the ultimate purpose of the defendants' restraint was not to max-
mize their profits, but to protect other patients and payers from having to absorb the cost
of granting discounts to [one particular payor]." Id. The finding that the motive of the
hospitals was, in the words of the court, "laudable" was an important element of the
court's decision that "the antitrust violation occurred in response to a unique set of cir-
cumstances that are unlikely to recur," and that the injunctive relief requested by the
Government was inappropriate. Id. at 1044.
bursement level beneath the previous contract. Such collusive conduct disproved the argument that a nonprofit hospital had no incentive to engage in anticompetitive conduct.

Further, the court found a potential for collusion in spite of the fact that the hospitals’ board of directors had an overwhelming affiliation with health care purchasers whose interests would suffer from collusive conduct between the hospitals. After rejecting the defendants’ contention that the hospitals’ actions were not collusive because Chicago Blue Cross had requested the allegedly collusive joint meeting among the hospitals, the court concluded that such an “overt example of past collusion” was helpful in predicting future anticompetitive conduct. The court also questioned defendants’ narrow premise that personal profit alone supplies the motivation for anticompetitive activity, noting that the profits created by monopoly rents might be sought to serve objectives “held in nearly as great esteem” by the decision-makers as personal profit.

The district court concluded that a combination of factors, including the level of market concentration, barriers to entry, vigorous competition, and the nature of the market participants indicated that the planned merger may have the effect of substantially lessening competition and therefore, was prohibited under Section 7 of the Clayton Act.

130. Id.
131. Id. One of the many variables that may affect nonprofit behavior is the composition of the board of directors. In Rockford, four of the five board members were affiliated with health care purchasers whose interests would suffer were the defendants to engage in anticompetitive conduct. The court dismissed this relationship as a superficial indication of the board’s loyalties. Id.
132. The defendants claimed that their meeting was not secretive or collusive, but rather that the joint meeting was initiated by the party against whom the defendants allegedly boycotted contract negotiations. Id.
133. Id.
134. Rockford, 717 F. Supp. at 1284. Expanding upon the potential motives that might drive anticompetitive activity of nonprofits, the court cited a broad range of human motivations, including the desire for better equipment, a bigger office, or the financial security of the organization. Id. The court also stated that “no one has shown that [nonprofit status] makes the enterprise unwilling to cooperate in reducing competition... which most enterprises dislike and which non-profit enterprises may dislike on ideological as well as selfish grounds.” Hospital Corp. of America v. F.T.C., 807 F.2d 1381, 1390 (7th Cir. 1986). C.f Joyce, The Effect of Firm Organizational Structure on Price-Fixing Deterrence, ECONOMIC ANALYSIS GROUP DISCUSSION PAPER 87-89, U.S. Dept. of Justice (November 3, 1987). A statistical study of antitrust violations found a strong link between a large ownership percentage in the firm and collusive behavior. Id.
2. The Seventh Circuit Decision

Although, as the parties framed the issues, the Seventh Circuit rejected the application of Section 7 to the proposed merger of non-profit hospitals, the court expressed its views on several significant Clayton Act issues. Most important to the potential application of Section 7 to nonprofit hospital mergers, was dicta making the argument "amazingly" not made by the Government, that the clause "subject to jurisdiction of the FTC" should be understood to refer to Section 11 of the Clayton Act instead of Section 5 of the FTC Act.136

The court of appeals described Section 11’s general statutory scheme as granting Clayton Act enforcement authority to five agencies, observing that the plain language of the statute provides that "authority to enforce compliance with section 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . the Federal Trade Commission where applicable to all other character of commerce."137 After noting that when Congress amended Section 7 in 1950 to prohibit acquisitions of assets by persons subject to FTC jurisdiction, it also amended the Clayton Act enforcement provisions contained in Section 11,138 the court concluded that “the force of the assets-acquisition provision in Section 7 is, therefore, merely to exempt mergers in the regulated industries enumerated in Section 11 [from application of the assets clause].”139 Because the regulated, exempted industries do not include the hospital industry, and the Clayton Act, while limiting FTC jurisdiction over regulated industries, "evinces no purpose of exempting nonprofit firms,” the Seventh Circuit declared that FTC jurisdiction could reach nonprofit hospitals via Section 11 of the Clayton Act.140

IV. ANALYSIS

A. Reasoning for the Decision

1. The District Court Expands the “Stock” Clause

The district court in Rockford held that the presence of stock or share capital is not necessary to trigger the stock or share capital
clause in Section 7 of the Clayton Act. This holding is controversial in light of the reliance on the plain language of the statute in *Carilion Health System*.141

The construction of Section 7 adopted by the court in *Carilion* is supported by the legislative history of the statute and its amendments. As originally enacted in 1914, the statute was intended to prevent the secret accumulation of wealth through the use of holding companies.142 Significantly, in the same year the Clayton Act was passed, Congress enacted the Federal Trade Commission Act granting the FTC jurisdiction over for-profit corporations both stock and nonstock.143 Because the original Clayton Act addressed only acquisitions of stock, many asset and merger transactions were insulated from attack under the original statute.144 When Congress amended Section 7 in 1950 to close this loophole by extending Section 7 to asset acquisitions, the amendment explicitly limited that reach to assets under FTC jurisdiction.145 However, because the FTC does not have jurisdiction over nonprofits, neither the FTC assets clause, nor the stock clause, could reach nonstock nonprofits.

The *Rockford* court began its argument for the application of Section 7 to nonprofits by citing *Philadelphia National Bank*146 as support for the proposition that Section 7 encompasses merger transactions not falling within the phrase “acquisition of stock.”147 The court correctly announced the *Philadelphia National Bank* rule that the amended Section 7 covers a wide range of corporate

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142. See generally Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); 2 E. KINTNER, LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES pt. 1, ch. 5 (1978). (Observing the congressional fear that trusts and holding companies held the ownership of an increasingly large amount of stock in American businesses and discussing the fact that the true identity of the owner was often hidden by the use of trusts and holding companies.). *Id.*
147. *Rockford*, 717 F. Supp. at 1252-56. See also notes 51-52 and accompanying text for a discussion of the differences between asset acquisitions, mergers, and stock acquisitions.
combinations from pure stock acquisitions to everything except a pure asset acquisition that is not tantamount to a merger. From this established precept, the court interpreted *Philadelphia National Bank* as providing license for an expansion of Section 7 to embrace transactions not involving stock or share capital.

In an effort to characterize the transaction at bar as somewhere between the poles of the stock-asset spectrum, the court focused on demonstrating that the transaction was not a pure asset acquisition. After distinguishing an asset acquisition from a merger and noting that the parties never claimed that the consolidation was an acquisition of assets, the court concluded that the transaction was a merger.

As the court held in *Carilion Health System*, the language of the stock clause suggests that to be within the statute, the transaction must at least involve stock. Further, *Carilion Health System* readily is reconcilable with *Philadelphia National Bank*, in which the Supreme Court found the bank merger within Section 7's stock-asset spectrum. The *Rockford* court rejected the argument that Section 7 jurisdiction required the presence of some stock and mistakenly characterized it as analogous to the argument made by the defendant banks in *Philadelphia National Bank*, that there was a distinction between acquisition of corporate control through a merger agreement or through the acquisition of the corporation's

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148. *Id.* at 1254.

149. *Id.* at 1256. The court's decision to apply the stock clause in the absence of stock or share capital also was supported by its interpretation of *Chelsea Savings Bank*, in which Section 7 reached the merger of two nonstock banks. See *supra* notes 119-122 and accompanying text for the court's analysis of the *Chelsea Savings Bank* decision. The first portion of *Chelsea Savings Bank* asserts that under *Philadelphia Nat'l Bank*, Section 7's reach includes nonstock banks. The *Rockford* court states that the *Chelsea Savings Bank* court had decided to apply Section 7 at this point in its opinion. *Rockford*, 717 F. Supp. at 1256. In the second portion of the *Chelsea* opinion, however, the court closely examined the similarities between the capital held by the depositors in a stock bank and that held by depositors in nonstock mutual savings banks such as *Chelsea Savings Bank*. Significantly, the court concluded that the depositors in *Chelsea Savings Bank* were holders of share capital and therefore, explicitly within Section 7's stock clause. United States v. *Chelsea Savings Bank*, 300 F.Supp. 721, 724 (D. Conn. 1969).


152. *Carilion Health System*, 707 F. Supp. at 841. In addition, the stock-asset spectrum analysis chosen by the Supreme Court in *Philadelphia Nat'l Bank* underscores the jurisdictional language of Section 7's stock and asset clauses and strongly suggests that, to be on the spectrum, the transaction must involve either stock or assets subject to FTC jurisdiction.

shares.154

The argument made by the defendants in Rockford is not analogous to that in Philadelphia National Bank in two important respects. First, the defendants in Philadelphia National Bank never claimed that the transaction did not involve any stock whatsoever. Second, unlike the defendants in Rockford, the banks did not deny the presence of a stock transfer. Instead, the banks sought to distinguish a stock transfer from a stock acquisition in an attempt to escape the literal Section 7 language providing "[n]o corporation shall acquire . . . stock."155 The Supreme Court in Philadelphia National Bank, however, concluded that the reenacted stock acquisition provision was intended to embrace transactions such as mergers that involve a transfer of stock.156 Therefore, contrary to the interpretation in Rockford, the distinction rejected by the Supreme Court was not between consolidation by agreement and consolidations by stock acquisitions.157 Rather, the Supreme Court refused to recognize the distinction urged by the banks between an acquisition of stock and the transfer of stock that occurs in a merger transaction.158 As the first court to apply the stock clause to a nonstock entity, the Rockford court went beyond the Philadelphia National Bank rationale that relied upon the presence of a stock transfer to trigger Section 7's stock clause.159

The Rockford court also used Chelsea Savings Bank160 to support its application of Section 7 to nonstock consolidations. In the early portion of the Chelsea decision, the court interpreted Philadelphia National Bank as principally concerned with the economic power of the resulting entity. The court found no reason to limit the Philadelphia National Bank rationale to banks that issue stock.161 The Rockford opinion explicitly states that it reads Chelsea as having decided to apply Section 7 at this point in its reasoning.162 The court essentially treated the last third of the Chelsea opinion as surplusage.

As the defendants in Rockford point out, however, a careful

154. But see Philadelphia Nat'l Bank, 374 U.S. at 344 n.22 (A cash purchase of assets that clearly was an evasive transaction and tantamount to a merger would be treated as a transaction subject to Section 7.).
156. Id. at 346.
158. Id.
161. Id. at 723.
reading of *Chelsea* reveals that the last third of the *Chelsea* opinion is highly significant. It is here that the *Chelsea* court demonstrated the practical equivalence of the depositors of a mutual savings bank and the shareholders in a stock bank. *Chelsea* also found that the depositors' capital should be classified as share capital within the reach of Section 7.  

The *Rockford* court misinterprets *Chelsea* as having decided to apply Section 7 "before it considered the 'little practical significance' between the interests of bank shareholders and non-stock mutual bank depositors." In other words, the *Rockford* court appears to read *Chelsea* as stating that the similarities between the interests of shareholders and depositors is of little consequence. In contrast, what the *Chelsea* court found was that the distinctions between the two forms of capital were of "little practical significance," and that the capital held by depositors was sufficiently similar to that held by shareholders to justify the application of Section 7 to the transaction.  

In addition to its mischaracterization of this aspect of the *Chelsea Savings Bank* decision, the *Rockford* court also failed to observe that *Chelsea* found that the merger transaction fell within a federal antitrust provision specifically including the defendant mutual savings banks. In sum, the *Rockford* court ignored the application of this provision, as well as the fact that the *Chelsea* decision rested upon a finding that the depositors held share capital.

2. The Seventh Circuit's Asset Clause Dicta

Although the argument that Section 11 of the Clayton Act

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163. *Chelsea*, 300 F. Supp. at 724. The *Chelsea* court observed that under Connecticut state law, the depositors of a mutual savings bank have incidents of ownership that are like those held by shareholders of a stock bank. For example, like shareholders, the depositors can receive dividends, may be divided into classes of ownership, and upon liquidation, take a ratable share in the assets remaining after satisfaction of claims. *Id.*

164. *Id.*


167. 12 U.S.C. § 1813 (1988). This provision was enacted to remove mutual savings banks from traditional antitrust analysis and is specifically tailored to address congressional concerns that are unique to the banking industry.

168. *Id.*


Authority to enforce compliance with section 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of Title
gave the FTC jurisdiction to challenge nonprofit mergers was not advanced by the Government at the district court level, and therefore waived on appeal to the Seventh Circuit, the latter offered a persuasive rationale, similar to the reasoning in *Adventist Health System*, to support a construction of Section 11 that would reach nonprofit mergers. The essence of the argument is that when Congress amended Section 7 to add the phrase “no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another,” it was thinking of the Commission’s Section 11 authority to enforce Section 7 “where applicable to all other character of commerce.”

The court supports this construction of the statute by pointing out that Congress also amended Section 11’s lengthy enforcement provisions to allow the FTC or the Attorney General to order divestment of assets as well as stock acquired in violation of the Act. It seems the court is contending that concurrent amendments to Section 7 and Section 11 establish a congressional appreciation for the interplay between the two sections, thereby supporting the notion that the phrase “subject to the jurisdiction of the FTC” was drafted with reference to Section 11 in order to exempt its regulated industries from coverage of the assets clause.

The likely reason why the Government failed to make this argument in the district court is because, since the 1950 amendment of Section 7, commentators and courts alike have presumed that

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49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised [as provided in the procedural sections which follow].


170. 5 Trade Reg. Rep. (CCH) ¶ 22658 (FTC 1989).


174. See E. KINTNER AND W. KRAMER, FEDERAL ANTITRUST LAW, § 45.9 at 218 (1986). The authors, one a former Chairman and General Counsel to the FTC, discuss FTC antitrust jurisdiction over nonprofits solely in context of FTC Act and state that “[t]he FTC is not given any jurisdiction over certain nonprofit corporations.” Id. For a discussion of nonprofits such as trade associations, which are subject to FTC jurisdiction, see supra notes 88-100 and accompanying text. See also 4 P. AREEDA & D. TURNER, ANTITRUST LAW, ¶ 906 at 22 (Supp. 1989). The authors, comparing the jurisdictional reach of Section 1 of the Sherman Act and Section 7 of the Clayton Act,
the phrase was intended to be a reference to the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act. Upon a brief consideration of the evolution of Clayton Act since 1914, a comparison of jurisdiction under Section 5 of the FTC Act and Section 7 of the Clayton Act, and a survey of statutes enforced by the FTC, the better argument seems to be that the phrase "subject to jurisdiction of the FTC" is a reference to Section 5 of the FTC Act.

The Clayton Act and the Federal Trade Commission Act, the latter of which created the FTC, were both enacted in 1914, largely in response to a growing dissatisfaction with the uncertainty created by judicial interpretation of the Sherman Antitrust Act. Each statute, in addition to permitting the government to enjoin incipient anticompetitive conduct, was intended in part to state that "[s]ection 7's jurisdictional scope is more restricted in only three respects . . . . [the third being that] asset acquisitions are covered only where the acquirer is subject to the jurisdiction of the FTC." Id. The authors refer to Section 5 of the FTC Act to illustrate such a restriction. Id. at n.2.

175. In U.S. v. Philadelphia Nat'l Bank, 321 U.S. 321, 336 (1963) the defendant banks argued that their proposed merger transaction was more like an assets acquisition than a stock acquisition. Addressing the import of this argument, the Supreme Court stated that "[t]he FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45 (a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7." Id. Clearly, the Court was reading the reference to FTC jurisdiction in the assets clause as pointing to the jurisdiction in Section 5 of the FTC Act, found at 15 U.S.C. § 45 (1988), and not to Section 11 of the Clayton Act. Even the district court in Rockford understood Section 7's reference to FTC jurisdiction as meaning jurisdiction under Section 5 of the FTC Act. The court made its understanding clear when it stated that an assets acquisition by a nonprofit entity would be exempt from Section 7. Rockford, 717 F. Supp. 1257.

176. Under Section 5 of the FTC Act, 15 U.S.C. § 45 (1988), the Commission is empowered to prevent corporations, other than those in certain regulated industries enumerated in Section 5, from using unfair methods of competition. Section 4 of the Act, 15 U.S.C. § 44 (1988), defines corporations to exclude nonprofits. Therefore, under Section 5 of the FTC Act, the Commission has no jurisdiction to reach a nonprofit unless it is organized, such as a trade association, for the profit of its members.

177. 15 U.S.C. § 45 (1988). That the Seventh Circuit, in dicta, made such a novel argument seems incongruous in light of remarks early in the opinion, when the court declined to stretch the stock clause to cover a nonstock nonprofit because such expansive interpretations are not "in vogue in the Supreme Court at the moment."


179. See e.g., 4 E. KINTNER, FEDERAL ANTITRUST LAW, § 33.1 (1984) (discussion of congressional dissatisfaction with enforcement actions under the Sherman Act); Id. § 43.75 (explaining that the FTC Act was to supplement the Sherman Act).

180. See supra notes 31-47 (for a discussion of the incipiency doctrine under the Clayton Antitrust Act, and also Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); FTC v. Cement Institute, 333 U.S. 683 (1948) (explaining the intent of the FTC Act to enjoin incipient combinations that could lead to restraints of trade).
reduce the inherent uncertainty in the Sherman Act's so-called "rule of reason." The FTC Act was to accomplish this end by establishing an agency, modeled upon the Interstate Commerce Commission, that would acquire the experience and expertise to enforce Section 5's "unfair methods of competition" prohibition against a consistent standard. The Clayton Act was intended to eliminate uncertainty by identifying particular anticompetitive practices, such as tying arrangements and stock acquisitions, and encourage enforcement by requiring the plaintiff to show a mere probable lessening of competition.

Although the Clayton Act addressed specific practices, FTC jurisdiction to attack "unfair methods of competition" by parties in Section 5 was viewed very broadly, described by one commentator as "a veritable empire of jurisdiction." Yet undoubtedly, despite Section 5's sweeping reach, in 1914 the FTC did not have jurisdiction over nonprofits. Section 5 of the FTC Act did not reach nonprofits and the Commission's Section 11 jurisdiction to enforce Section 7 could reach only transactions involving stock. Nor would it seem reasonable, in light of the breadth of the Commission's Section 5 jurisdiction and its unambiguous exemption for nonprofit entities, to presume that Congress intended Section 11's grant of FTC enforcement authority to extend to a new class of parties such as nonprofits. Because Section 11 vests authority to administer Clayton Act prohibitions in various federal agencies, the provision should be interpreted as a grant of enforcement power, and not as an oblique attempt to increase the types of parties over whom the FTC has jurisdiction.

Viewed against this background, the 1950 amendments to Section 7 do not extend its reach to nonprofits. Instead, the amendments simply were intended to plug the assets acquisition loophole and "would merely give the Commission the same power in regard to asset acquisitions that it already possesses over acquisitions of...

181. The "rule of reason" was first enunciated in Standard Oil v. United States, 221 U.S. 1 (1911) and, in essence, prohibited only those restraints on trade that were unreasonable. The obvious difficulty in applying such a standard was summarized by one commentator who noted that "[i]f the Sherman Act did not prohibit all restraints of trade, but only those that were unreasonable, then some way ought to be devised to let the businessman know in advance which was which." Cushman, The Problem of the Independent Regulatory Commission, in Report of the United States President's Committee on Administrative Management in the Federal Government, 205, 211 (1937).

In Philadelphia National Bank, the Supreme Court, addressing the question of whether bank mergers were within the statute, explained that "the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in § 7 was not to limit the amalgamations to be covered by the amended statute, but rather to make explicit the role of the FTC in administering the section." To be sure, Philadelphia National Bank interpreted the amended Section 7 as expanding FTC jurisdiction to reach all business combinations on the stock-asset spectrum, but it does not stand for the proposition that the amendment brought new parties within the statute. In fact, by citing Section 5 to reference FTC jurisdiction, the Court demonstrated its appreciation for the distinction between the scope of the FTC's enforcement power, which the amendment had increased to include all "amalgamations," and the parties over whom the FTC has jurisdiction, which remained under Section 5, the same as it had before the amendment.

In addition, contrary to the contention of the Seventh Circuit, reading the FTC jurisdiction phrase as a reference to Section 11 is not necessary to "exempt mergers in the regulated industries enumerated in Section 11." Instead, the plain language of the phrase "subject to jurisdiction of the FTC," when read as a reference to Section 5, would also have the effect of exempting the regulated firms in Section 11. Although the court of appeals, in support of its exemption argument, points to minor Section 11 amendments made to accommodate the new "assets" jurisdictional phrase in Section 7, the Court stated: "Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U.S.C. § 45(a)(6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U.S.C. § 21." Instead, the plain language of the phrase "subject to jurisdiction of the FTC," when read as a reference to Section 5, would also have the effect of exempting the regulated firms in Section 11.

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184. Id. at 346.
185. Id. at 342.
186. The Court stated: "Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U.S.C. § 45(a)(6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U.S.C. § 21." Id. at 345 n.22.
187. As the sole support for its interpretation that the FTC jurisdictional phrase is a reference to Section 11, the Seventh Circuit cites a footnote from P. Areeda & D. Turner, Antitrust Law, ¶ 906, at 797 n.2 (Supp. 1989). The court's reliance upon this footnote is misplaced as support for its argument that the reference to the FTC in Section 11 is not to the Commission's Section 5 jurisdiction. Areeda and Turner explain that the effect of the jurisdictional phrase is to exclude from FTC jurisdiction those industries regulated by other agencies. Because both Section 5 and Section 11 exclude certain regulated industries, the authors' comment is ambiguous. To be consistent with the other instances in which Areeda and Turner have acknowledged that the jurisdictional language refers to Section 5, this reference also should be read as referring to Section 5.
tion, it ignores an amendment to Section 7 intended to maintain the status quo by exempting from Section 7 all transactions "duly consummated pursuant to the authority given by [certain designated agencies]." Thus, by appending a new paragraph preserving the authority of designated agencies to authorize transactions under their own organic statutes, Congress specifically tailored the exemption from FTC jurisdiction to a set of industries, some included, and some excluded, from Section 11. The presence of such an explicit exemption tends to undercut the argument made by the Seventh Circuit that Section 7's jurisdictional phrase was merely a reference Section 11 made to exclude its regulated industries.

A survey of other statutes enforced by the FTC reveals that Congress consistently has recognized the jurisdictional limitations in the FTC Act and, when it has intended to expand the class of parties against whom the Commission has jurisdiction, has used statutory language that clearly accomplishes that result. For example, all statutes or subchapters under the Truth in Lending Act operate under an enforcement scheme similar to that in the Clayton Act. The statutes, like Section 11 of the Clayton Act, first grant enforcement authority to specialized agencies in charge of regulated industries. The statutes then provide that, except to the extent enforcement authority is vested in another agency, the FTC shall enforce its provisions. However, unlike the Clayton Act, these statutes specifically enlarge the parties against whom the FTC can act, granting the Commission enforcement power "irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act." Other statutes explicitly authorize the Commission to use

188. United States v. Rockford Memorial Corp., 898 F.2d 1278, 1280 (7th Cir. 1990).
193. See e.g., 15 U.S.C. § 1607(c) (1988) (providing that "[e]xcept to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements").
194. See e.g., 15 U.S.C. § 1607(c) (1988) (providing that all the FTC's enforcement
the enforcement procedures in the FTC Act\textsuperscript{195} or incorporate those procedures indirectly by defining targeted conduct as an "unfair method of competition" under Section 5.\textsuperscript{196}

Admittedly, the fact that Congress, in legislation subsequent to the 1950 amendment of the Clayton Act, frequently has enlarged or circumscribed the Commission's jurisdiction by reference its organic statute, is not overwhelming evidence that it intended to do the same by referencing the FTC Act in the 1950 amendments. When considered along with the design of the original Clayton Act, the interpretations of the Supreme Court, and in light of the scant legislative history addressing the jurisdictional clause, however, such a construction appears to better effectuate congressional intent and more readily fits into the Clayton Act's legislative scheme.

\textbf{B. Propriety of the Application of Section 7 to Nonprofit Hospitals}

Commentators have observed that the standards of liability are similar under Section 7 of the Clayton Act and Section 1 of the Sherman Act.\textsuperscript{197} One author stated that "[t]he relevant antitrust policy considerations are independent of the verbal formula

\begin{footnotesize}
\textsuperscript{195} See \textit{e.g.} 15 U.S.C. \S\ 70(e) (1988); 15 U.S.C. \S\ 1194 (1988).
\textsuperscript{196} See \textit{e.g.} 15 U.S.C. \S\ 1456(b) (1988).
\textsuperscript{197} 2 P. AREEDA, \textit{ANTITRUST ANALYSIS}, \S\ 304 at 6 (1981). (The "substantial lessening of competition" language of the Clayton Act has "coalesced" with the Sherman Act standard of "unreasonable restraints on trade" into a single standard of liability.\textsuperscript{)}
\end{footnotesize}
Liability under Section 7 requires the court to find that the effect of a transaction "may be substantially to lessen competition, or tend to create a monopoly." Inherent in such a standard is the necessity of a prediction of the likelihood of future, anticompetitive conduct. In contrast to Section 7, the standard of liability under Section 1 of the Sherman Act requires no such prediction. Thus, while both statutes may prohibit similar anticompetitive conduct, a violation of Section 7 occurs when that conduct is shown to be reasonably likely. The Sherman Act will apply only when a restraint on trade actually is shown.

The Clayton Act standard for predicting whether a substantial lessening of competition will occur is one of reasonable probability. The Philadelphia National Bank Court noted that any prediction of impact upon future competitive conditions "is sound only if it is based upon a firm understanding of the structure of the relevant market." Once the structure of the industry and market is understood, the court can attempt to assess the potential for anticompetitive conduct using traditional economic theory that assumes a for-profit corporation will profit-maximize and, given the opportunity, will exercise market power to the detriment of the consumer.

Prediction of the economic behavior of nonprofits is even more perilous than for-profits because nonprofit behavior in the hospital

198. Id.
200. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957) (Section 7 "applies whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce.").
201. United States v. Penn-Olin Chemical Co., 378 U.S. 158, 171 (1964) (stating that Section 7 reaches transactions that the Sherman Act could not since actual restraints need not be proven under the Clayton Act).
204. See Pauly, Nonprofit Firms in Medical Markets, 77 AMER. ECON. REV. 257, 258 (1987); Bok, supra note 203, at 238-48. The author discusses the difficulty and uncertainty surrounding predictions of the effect of all but the largest mergers. The difficulty is most acute when the merger takes place in an oligopolistic market. Oligopolistic markets are those in which "products may vary in quality and where producers may be large enough to affect each other's operations by their own business decisions." Id. Professor Bok explains that in such markets, the producer is insulated from his rivals in a way that multiplies the business alternatives available to the businessman. For example "[h]e may vary his methods of production, spend more or less on advertising . . . seek to maximize his profits in the immediate future . . . or permanently reduce his return out of a feeling of fairness . . . or a fear of eventual government intervention." Id.
industry is not well understood and arguably is motivated by concerns different than those upon which the antitrust laws traditionally assume to motivate businesses. 205 Therefore, a firm understanding of the hospital market structure may be of little use if the motivations that lie beneath managerial decisions are not the same as those of for-profit corporations. Yet, an examination of the structure of nonprofit hospital industry may provide useful insights to the environment in which decisionmakers operate.

Three basic structural qualities are unique to nonprofit hospitals. 206 First, nonprofits may not issue stock and must raise capital from donations or contributions of governments. 207 Second, nonprofits are not permitted to distribute any excess of revenues over expenses as a dividend. 208 Third, a nonprofit enterprise cannot be reduced to proceeds in a liquidation or sale that are distributable to its members. 209 From an antitrust perspective, the most fundamental characteristic present in each of these three qualities is a limitation upon the transfer of wealth to the organization's operators. 210 This limitation is significant. A recent study of antitrust actions brought by the Department of Justice found that the ability to extract the bounty of anticompetitive conduct is an important motivator for anticompetitive behavior. 211 In light of the fundamental differences between for-profit and nonprofit enterprises, the efficiency rules and assumptions about profit maximizing objectives that presumably allow economists to model for-profit behavior provide an incomplete guide in explaining the motivations of nonprofits. 212

The existence of nonprofit organizations is in large part predi-

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205. See infra notes 224-30 and accompanying text explaining that the traditional profit-maximizing motive is not imputed to the nonprofit organization by many economists.
207. ILL. REV. STAT. ch. 32, para. 106.05 (1989).
208. Id.
209. Id. para. 112.16.
210. These limitations upon the distribution of wealth to the operators of a nonprofit organization may inhibit only such distribution or cause distributions to be accomplished in an inefficient manner. See infra notes 213-22 and accompanying text.
211. J. Joyce, The Effect of Firm Organizational Structure on Price-Fixing Deterrence, ECONOMIC ANALYSIS GROUP DISCUSSION PAPER, 87-89, U.S. Dept. of Justice (November 3, 1987). (Antitrust violations are perpetrated by individuals that personally gain via a large percentage ownership interest in the firm.).
icated upon consumer knowledge that the behavior of decisionmakers is circumscribed by the inability of nonprofits to distribute profits. In certain situations, donors and consumers can rely on distribution limitation to ensure that their generosity or patronage does not inure to the benefit of the firm's operators. In the hospital setting, the distribution limitation can provide a measure of confidence to a consumer who may be in a poor position to evaluate the adequacy of complex services she receives. Because the average patient must place her trust in the discretion of the health care provider, the presence of some limitation upon the potential abuse of that discretion helps protect patients who lack health care expertise. The distribution limitation is not the only protection relied upon by patients in modern hospitals. For instance, physicians with admitting privileges may serve the function of monitoring the service provided and acting as a purchasing agent for the patient. Although it may be more difficult to appreciate the presence of the distribution limitation in a hospital than in an organization that raises funds through donations, such a limitation still may operate to prevent decisionmakers from exploiting the benefits ownership would provide.

In the health care community, the distribution limitation is reinforced by several mechanisms. First, distributions of profits to members of a nonprofit organization expose the trustee to civil suits and may jeopardize the organization's tax exempt status. Second, legal sanctions are reinforced by social norms that prohibit profiteering, especially in a large, pluralistic organization. Similarly, observable violations will breach the trust of volunteers and donors who help perpetuate the organization. Third, hiring deci-

214. Id. at 862. In contrast, the presence of the distribution limitation is most visible in organizations that provide a public good and that rely upon donations. Listener-supported public radio is a good example. Such an enterprise relies upon the distribution limitation to assure its listeners that it is not soliciting contributions in excess of need for the benefit of any owners. The distribution limitation on nonprofits helps assure donors as well as patrons, that some limitation exists upon the discretion of decisionmakers to trade quality for personal gain. Id.
215. Id.
216. See Newhouse, Toward a Theory of Nonprofit Institutions: An Economic Model of a Hospital, 60 AMER. ECON. REV. 64 (1970).
217. Id.
219. I.R.C. § 501(c)(3) allows an exemption from federal income tax for certain organizations provided that "no part of the net earnings [inure] to the benefit of any private shareholder or individual." Id. § 501 (c)(3) (West 1990).
sions and a process of self-selection may ensure that the managers of nonprofits are more responsive to the fiduciary role of the organization. The significance of the distribution limitation in nonprofit hospitals is that it tends to dilute the incentive to engage in collusive behavior. Absent the ability to withdraw the bounty of collusive behavior, the linkage between market concentration and collusion is weakened because a nonprofit with market power has less incentive to collude to the detriment of consumers.

The antitrust laws operate on the premise that business enterprises seek to maximize profits. The profit-maximization assumption allows economists to build models to predict economic behavior. Another indication of the different motives that drive for-profit and nonprofit organizations is the presence of several different motivational assumptions in nonprofit economic behavior models. The variety of motivations inherent in these models reflects the lack of consensus over nonprofit behavior. The motivations of nonprofit hospitals commonly are modeled differently than for-profit businesses. For example, the budget or output maximizer model posits that hospital decisionmakers seek the salaries, prestige, and perquisites that may accompany the administration of a large organization with a large budget. This view is similar to

220. H. Hansmann, supra note 213, at 876.
221. A recent Department of Justice study indicated that antitrust violations are perpetrated by individuals with a large ownership percentage who are in a position to reap personal gains. Joyce, The Effect of Firm Organizational Structure on Price-Fixing Deterrence, ECONOMIC ANALYSIS GROUP DISCUSSION PAPER, 87-89, U.S. Dept. of Justice (November 3, 1987).
222. See supra notes 26-29 and accompanying text for a discussion of the use of market concentration as a proxy for assessing the likelihood of collusion.
225. See generally Danzon, Hospital “Profits”: The Effect of Reimbursement Policies, 12 J. HEALTH CARE ECON. 1, 29-52 (1982); Feldstein, Hospital Price Inflation: A Study in Nonprofit Price Dynamics, 61 AMER. ECON. REV. 853, 855 (1971); Steinberg, supra note 224, at 508.
226. Steinberg, supra note 224, at 508.
227. See Feldstein, 61 AMER. ECON. REV. at 855; Steinberg, 17 RAND J. ECON. at 508. Another theory, the consumer and hospital welfare model, assumes that hospital decisionmakers seek to maximize the sum of the joint welfare of the hospital and its patients. This model stands in contrast to economic models of monopolistic behavior that assume a monopolist that will maximize his own welfare. The joint welfare model implicitly assumes that decisionmakers in hospitals derive some utility from providing quality care. Such an interest in a measure of utility other than profits will dictate an optimal price different than that of a profit-maximizer. See e.g. Steinberg, supra note 224, at 508; Pauly, Nonprofit Firms in Medical Markets, 77 AMER. ECON. REV. 257, 258 (1987). Several commentators have observed that nonprofit hospital pricing typically covers only operating costs and is insufficient to provide a return on capital. See
the finding in *Rockford* that nonprofit conduct might be driven by motivations other than pure profit. But the behavior predicted by such a model is inimical to the behavior of a monopolist who seeks to lower output and raise prices in order to maximize producer surplus to the detriment of the consumer. More specifically, the objective of budget maximization is inconsistent with the monopolist's selection of a profit-maximizing price.

This Comment is not intended to suggest that nonprofit entities be exempt from the application of the antitrust laws. Instead, this discussion may serve to illustrate that the economic behavior of nonprofits is not viewed by most economists as the same as for-profit behavior. In fact, significant structural and motivational differences expose the attenuated nature of any prediction of the economic behavior of a nonprofit. Yet application of Section 7 of the Clayton Act requires precisely such a prediction. Economics literature suggests that the known objectives of for-profit firms provide ample foundation on which to base a prediction of for-profit behavior. Because economic theory cannot adequately predict the behavior of nonprofits, the judiciary should avoid the additional level of speculation presented by nonprofit status and instead apply Section 1 of the Sherman Act only when an actual restraint is shown.

In addition, violations of the Sherman Act are susceptible of a more precise remedy than violations of Section 7. Because Section 1 is triggered only by a concrete instance of restraint of trade, the court can grant relief more appropriately tailored to the particular violation. This advantage is illustrated by a comparison of the holdings in *Rockford* and *United States v. North Dakota Hospital Association*.

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229. Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1, 39 (1984) (observing that only practices that raise price and lower output should be attacked under antitrust policy). *See also supra* notes 24-25 discussing the behavior of a monopolist.


231. *See supra* notes 205-30 and accompanying text for an extended discussion of the difficulties inherent in predicting the economic behavior of nonprofits.

232. *See supra* notes 26-31 and accompanying text.


234. One variable for which economic theory cannot account is composition of the board of directors. *See supra* note 131 for a discussion of how this variable may affect a nonprofit's behavior.

The *Rockford* court found that the defendants had collectively withheld signing a reimbursement contract with a third party payor. The court cited *North Dakota Hospital* for its holding that a similar, concerted resistance against reimbursement reductions was a violation of Section 1 of the Sherman Act. The court explained that an instance of such collective activity was an indication that anticompetitive activity was likely in the post-merger market.

The *North Dakota Hospital* holding is interesting in the context of the Section 7 claim in *Rockford* because the former denied the injunctive relief sought by the Government despite the proof of a Section 1 violation. The holding stated that, despite the existence of a past violation, the "government [had] failed to prove that there is a presently existing actual threat of defendants violating the antitrust laws." In *Rockford*, no violation was proven nor tried, yet the court went further than *North Dakota Hospital* and found an alleged instance of collective behavior sufficient to trigger injunctive protection.

The importance of appropriately tailored relief is heightened by recognition of the fact that permanent and certain losses result from any decision to apply Section 7 to a merger that will produce operating economies. The Department of Justice *Merger Guidelines* acknowledge that the realization of efficiency benefits often is the impetus driving mergers transactions. For example, *Rockford* noted the potential for $40 million in savings in the first five years following the merger. The costs of the *Rockford* decision are magnified by the fact that the case establishes new precedent that may unduly restrict consolidations necessary for hospitals to

237. Id.
238. Id.
239. *North Dakota Hosp. Ass'n*, 640 F.Supp. at 1044. The court also noted that the resistance of the hospitals to reimbursement rate pressures was not founded in an intent to maximize profits, "but to protect other patients and payers from having to absorb the cost of granting discounts to [the reimbursing party]." Id. at 1038.
240. Id. at 1044.
241. *Rockford*, 717 F. Supp. at 1286-91. The court also found the collective resistance to the reimbursing party to defeat the defendants' argument that affiliations of board members with health care purchasers would prevent anticompetitive conduct that would injure those purchasers. Id.
survive and better serve patients. Indeed, the need for mergers and consolidations has become more pressing in light of drastic changes recently imposed upon the cost structure of the health care industry. The process toward consolidation in an industry whose cost structure has changed radically should not go unchecked. Section 1 of the Sherman Act, however, provides a remedy adequate to attack actual restraints upon competition without the risk of blocking the beneficial combinations that must occur in the next decade to reduce costs and capacity.

V. CONCLUSION

The application of Section 7 of the Clayton Act to a nonprofit hospital merger by district court in Rockford was achieved by an expansive interpretation of the statute and precedent. The decision to apply Section 7 to nonprofit hospitals requires a difficult assessment of the motives driving the economic behavior of such institutions. The inability to base such a prediction upon traditional economic principles suggests that Section 7 of the Clayton Act is not the proper vehicle to attack nonprofit hospital mergers. Instead, Section 1 of the Sherman Act, as applied by the Seventh Circuit in Rockford and by the Carilion court, is more appropriately applied to such mergers. Section 1 of the Sherman Act provides an adequate remedy to challenge actual restraints on trade, yet relieves the courts of the burden of predicting nonprofit behavior, and prevents the permanent loss to society that occurs when judicial predictions erroneously condemn a beneficial consolidation.

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