Antitrust Law in Healthcare

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What are we going to talk about today?

The most important thing:

Antitrust = RIGHT

Anti-trust = WRONG

What ELSE are we going to talk about today?

- Federal laws
  - HSR filings
- Enforcement trends
- State issues

Key federal antitrust laws

- Sherman Act
  - Section 1
  - Section 2
- Clayton Act
  - The Robinson-Patman Act
- Federal Trade Commission (FTC) Act
- Hart-Scott-Rodino (HSR) Act

Section 1 of the Sherman Act

"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." 15 USC § 1.

- Looking at agreements between independent economic entities.
- Courts have interpreted this to apply to arrangements that "unreasonably" restrain competition.

Section 1 of the Sherman Act

- "*Per Se*" Agreements
  - Some agreements are deemed illegal *per se*.
    - "Naked" horizontal price-fixing
    - Bid rigging
    - Market allocation
  - Civil and criminal liability

Section 1 of the Sherman Act

- Other agreements that can raise antitrust concerns: the rule of reason
  - Horizontal exchanges of price information
  - Group boycotts and concerted refusals to deal
    - Can be *per se*
  - Joint ventures
  - Horizontal mergers
  - Vertical mergers
  - Tying arrangements
  - Exclusive dealing agreements
  - Vertical price-fixing/market-allocation agreements

Section 2 of the Sherman Act

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]" 15 USC § 2.

- This is generally unilateral exclusionary conduct of a firm that has, or would obtain through the exclusionary conduct, a substantial degree of market power.

Section 2 of the Sherman Act

- Can include conspiracies to monopolize.
- Can't I just be the best? YES!
- What's monopsony?

The Clayton Act

- Areas of coverage:
  - Section 2: Price discrimination
    - This is supplemented by the Robinson-Patman Act.
  - Section 3: Exclusive dealing contracts
  - Section 3: Tying arrangements
  - Section 7: Anticompetitive corporate mergers and acquisitions
  - Section 8: Interlocks of directors and certain officers
- Generally civil liability only

The Clayton Act

Price discrimination

- Prohibits suppliers from selling goods of like grade and quality at different prices to competing resellers.
- It's been a dead letter for decades.
  - Why?
- The Biden administration raised it early on and finally brought two actions:
  - *Southern Glazer's Wine and Spirits*
  - *Pepsi*
- Some private actions have popped up, too.

The Clayton Act

Exclusive dealing contracts

- Common vertical arrangement
- Pro-competitive benefits
- Examples of healthcare challenges
  - Arrangements between hospitals and hospital-based physicians
  - Arrangements between health plans and other providers foreclosing the excluded providers from treating the health plan's members.

The Clayton Act

Tying arrangements

- May be *per se* unlawful if:
  - two separate products or services are involved
  - the agreement to sell one product or service is conditioned on the buyer's agreement to purchase a different product or service
  - the seller has sufficient market power for the tying product to restrain competition in the market for the tied product
  - the tying arrangement affects a not-insubstantial amount of commerce.
- Otherwise evaluated under the rule of reason.

The Clayton Act

Anticompetitive corporate mergers and acquisitions: horizontal mergers

- Theories of harm: (1) unilateral effects, (2) coordinated effects, (3) monopsony, and (4) partial acquisitions.
- Evidence of harm: (1) market shares and concentration, (2) natural experiments, (3) close head-to-head competition, (4) potential competitors, (5) customer complaints, and (6) actual effects of consummated mergers.

The Clayton Act

Anticompetitive corporate mergers and acquisitions: vertical mergers

- The danger is foreclosure.
  - Availability of Substitutes
  - Competitive Significance of the Related Product
  - Effect on Competition in the Relevant Market
  - Competition Between the Merged Firm and the Dependent Firms
  - Barriers to Entry and Exclusion of Rivals
  - Prior Transactions or Prior Actions
  - Market Structure
  - Nature and Purpose of the Merger

The Clayton Act

Interlocks of directors and certain officers

- Section 8 prohibits a person from serving as a director of two competing companies.
- Point of emphasis in the last administration
  - Appears to continue
- Thresholds to enforce
- Safe harbors exist when there are low competitive sales.

The FTC Act

Section 5: "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." 15 USC § 45.

- The FTC has exclusive authority to enforce the FTC Act.
  - Courts have interpreted the FTC Act to permit the FTC to bring administrative actions for the same conduct that would violate the Sherman Act.
- Broader scope than the Sherman Act?

The HSR Act

- The Hart-Scott-Rodino Antitrust Improvements Act of 1976
  - Regulations promulgated by the FTC
- Certain transactions reviewed by the FTC and DOJ

HSR: do I need to file?

- Size of transaction test
- Size of person test
- Exemptions/immunities

HSR: do I need to file?

Size of transaction test

- The acquiring person will hold aggregate voting securities, assets, or non-corporate interests of the acquired person valued at more than $126.4M.
  - Adjusted annually.
- *Acquisitions of non-corporate interests that do not confer control of the target*: NOT reportable.
- *Acquisitions of non-voting securities, such as warrants, stock options, or convertible securities*: NOT reportable.

HSR: do I need to file?

Size of person test

- Applies to transactions valued at more than $126.4M up to $505.8M.
  - Transactions over $505.8M are reportable unless an exemption applies.
- We need to determine the Ultimate Parent Entity or UPE to apply the size of person test.
  - The UPE is the person or entity that "controls" the acquired or acquiring entity.
  - What is "control"?
    - *Corporation*: the person holding 50% or more of the voting securities or having the contractual power to designate 50% or more of its directors.
    - *Unincorporated entity*: the person that has the right to 50% or more of the acquired/acquiring entity's profits or the right, in the event of dissolution, to 50% or more of the acquired/acquiring entity's assets.

HSR: do I need to file?

Size of person test

1. *UPE of one party* has annual net sales or total assets of at least $252.9M
2. *UPE of the other party* has annual net sales or total assets of at least $25.3M
   - **Exception**: if not engaged in manufacturing, annual net sales of $252.9M or total assets of at least $25.3M.

HSR: do I need to file?

Exemptions

Immunities

Exemptions/Immunities

- Federal enforcers don’t want you to know this one weird secret….

Exemptions/Immunities

<u>The state action doctrine</u>

- Immunizes anticompetitive actions that are the intentional or foreseeable result of state or local government policy.
- HSR and other antitrust laws do not apply to actions taken by private parties if:
  a) there is a clearly articulated policy to displace competition, and
  b) the state actively supervises the policy.
- *Example*: Certificates of Public Advantage or COPAs.

Exemptions/Immunities

- Acquisitions of Voting Securities of Companies Holding Exempt Assets
- Acquisitions of Real Property Assets
  - New Facilities
  - Used Facilities
  - Unproductive Real Property
  - Office and Residential Property
  - Hotels and Motels
  - Recreational Land
  - Agricultural Property
  - Retail Rental Space and Warehouses
  - "Investment rental property assets"

Exemptions/Immunities

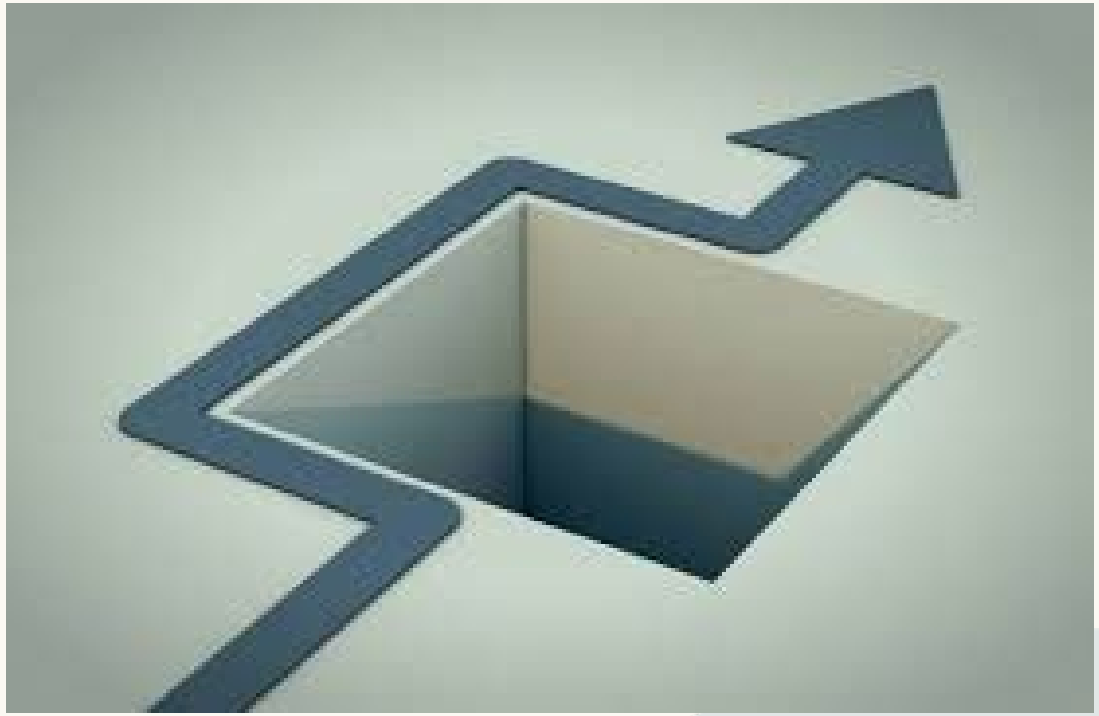
- Acquisitions Solely for the Purpose of Investment
- Pro Rata Exemption
- Acquisitions of Foreign Assets
- Acquisitions of Voting Securities of a Foreign Issuer
  - By U.S. Persons
  - By Foreign Persons
- Intraperson Transactions
- Acquisitions of Goods in the Ordinary Course of Business

Exemptions/Immunities

- Acquisitions of Carbon-Based Mineral Reserves
- Federal Agency Approval
- Certain Supervisory Acquisitions
- Amended or Renewed Tender Offers
- Acquisitions by Employee Trusts
- Exempt Formation of Corporations or Unincorporated Entities
- Partial Exemption for Acquisitions in Connections with the Formation of Certain Joint Ventures or Other Corporations
- Acquisitions by or from Foreign Governmental Entities
- Certain Foreign Banking Transactions
- Acquisitions by Securities Underwriters
- Certain Acquisitions by Creditors and Insurers
- Acquisitions of Voting Securities by Certain Institutional Investors
- Exempt Acquisitions of Non-Corporate Interests in Financing Transactions
- Acquisitions Subject to Order
- Acquisitions by Gift, Intestate Succession or Devise, or by Irrevocable Trust
- Transitional Rule for Transactions Investigated by the Agencies
- Transfers to or from a Federal Agency or a State or Political Subdivision thereof

Devices for Avoidance

- Parties cannot structure transactions to intentionally evade HSR review.
- Examples:
  - Separate acquisitions between the same parties.
  - Indirect acquisitions.



HSR: I need to file. Now what?

- February 10, 2025: Extensive changes to the HSR filing requirements went into effect.
  - The changes significantly expand the types of information and documents to be provided.
  - The biggest changes apply to deals with competitive overlap.

Document production

Document production

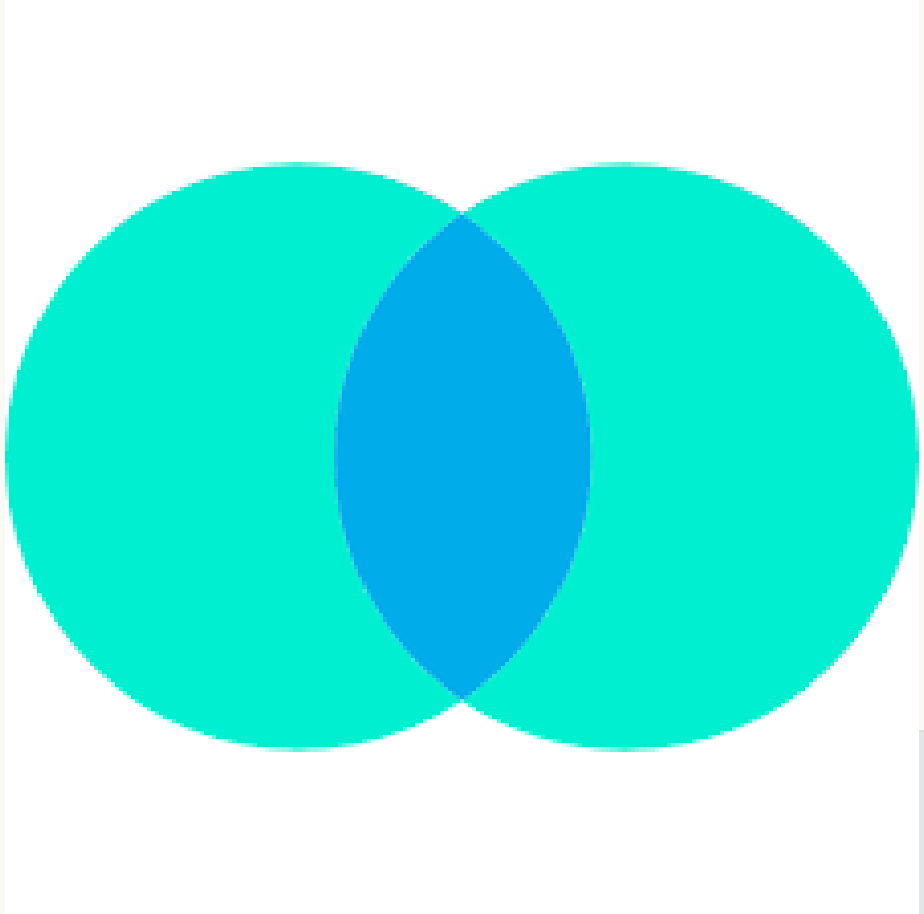
- Must produce documents prepared by or for the "Supervisory Deal Team Lead," an individual who has the "primary responsibility for supervising the strategic assessment of the deal."
  - May or may not be an officer.
- Must produce <u>any</u> draft that goes to <u>any</u> board member.
  - <u>Previously</u> we just produced final documents prepared by or for ***officers or the whole board*** that were used to assess competitive dynamics of transaction.
  - <u>Why the change</u>? As a practical matter, someone other than an officer or director often functions as the leader of the deal team.

You'll need to explain what the parties do.

- Each filing party will
  - describe the principal categories of their products and services
  - identify current and planned products or services that compete—or could compete—with the other filing party
  - Identify sales (or similar metric) and customers for most recent year.
    - This is a *business* assessment.
- Previously, there was no similar requirement.
- The agencies want this to better understand market realities and plans for potential products, services, and collaborations.

Is there competitive overlap?

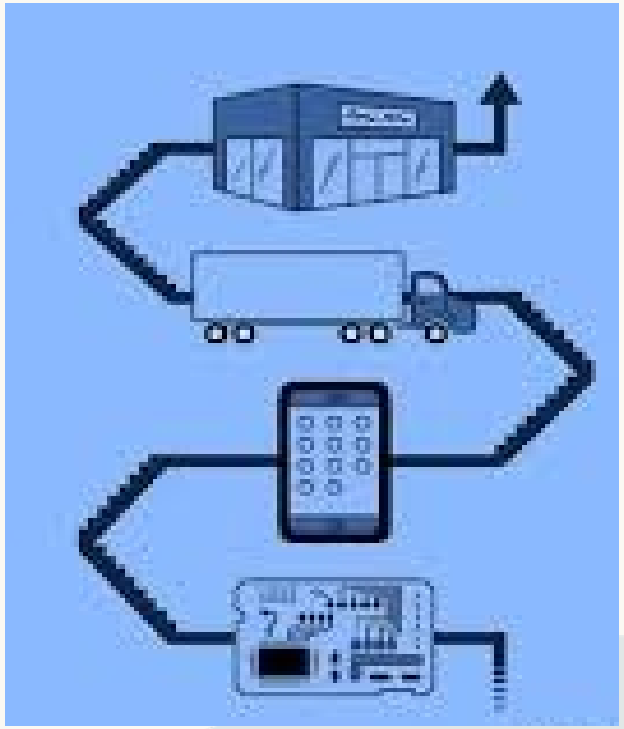
- NAICS Codes: overlap occurs when both parties derive revenue from the same 6-digit NAICS industry code.
- Actual horizontal overlap: a party's current and planned products or services do compete, or could compete, with the current and planned products or services of the other filing party.



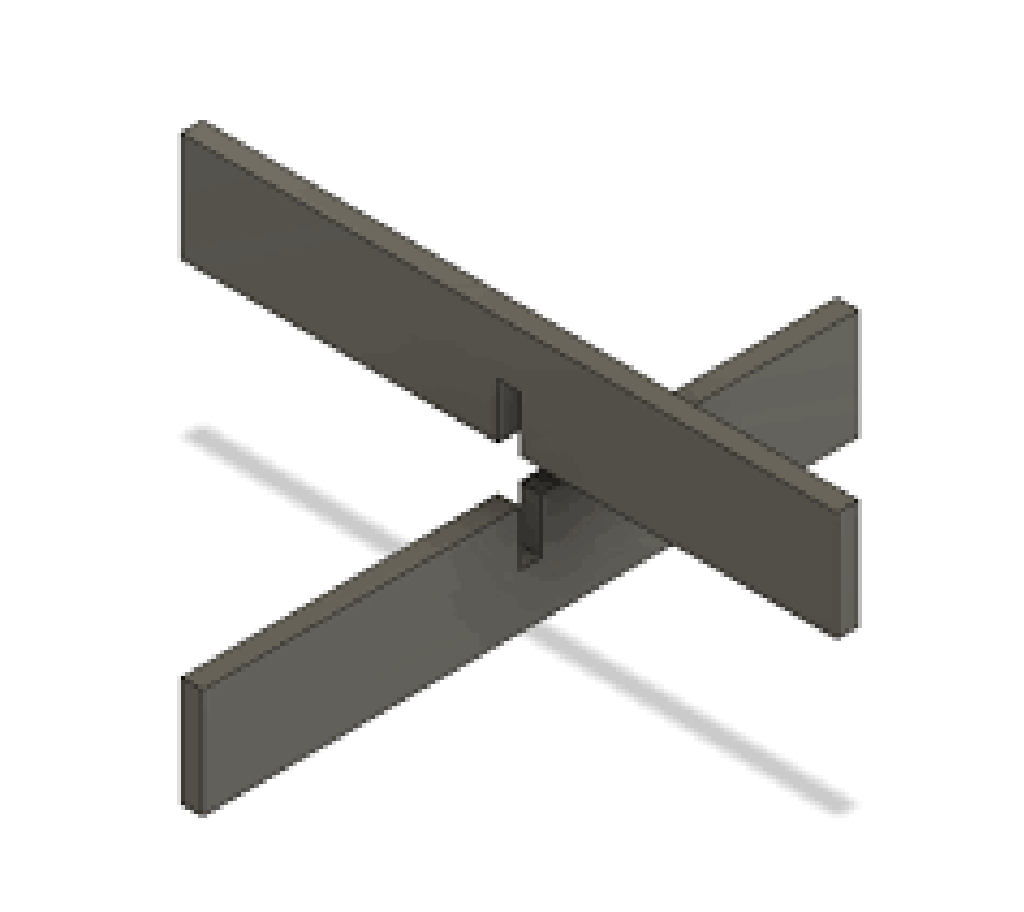
Vertical relationships matter.

New requirement: the parties must describe their existing or potential vertical relationships (including suppliers) between the filing parties and identify sales information and top 10 customers or suppliers.

Why does this information matter? The agencies didn't get information to identify vertical and non-horizontal issues, including those presented by diagonal mergers.



Tracking interlocking directorates



New requirement: The acquiring person must identify officers and directors of entities that contribute to a competitive overlap or have a supply relationship with the target.

Why do the agencies want this? To identify existing, prior, or potential director overlaps.

Regularly prepared strategic plans

New requirement: If an actual overlap exists, each side must provide plans and reports provided to the Board or CEO within one year of filing that analyze competition of any disclosed overlap product or service.

- This applies to the Board and CEO of each entity between the buyer and its UPE.
- Regularly prepared means annual, semi-annual, and quarterly, but not monthly (go figure).

Why do the agencies want this? To understand the company's internal assessment of commercial realities of the premerger marketplace.

Additional disclosure of prior acquisitions

If NAICS or actual overlap exists, the parties must identify prior acquisitions in the same NAICS or reported overlap industry over the past five years, even if the transaction was non-reportable.

Why do the agencies want this? To evaluate the effects of small mergers on local markets and to identify "serial" acquisitions.

Federal enforcement

- What are the FTC and DOJ doing now?
- How has this changed with the new administration?

- It's early, but there are definitely shifts.

Philosophical changes

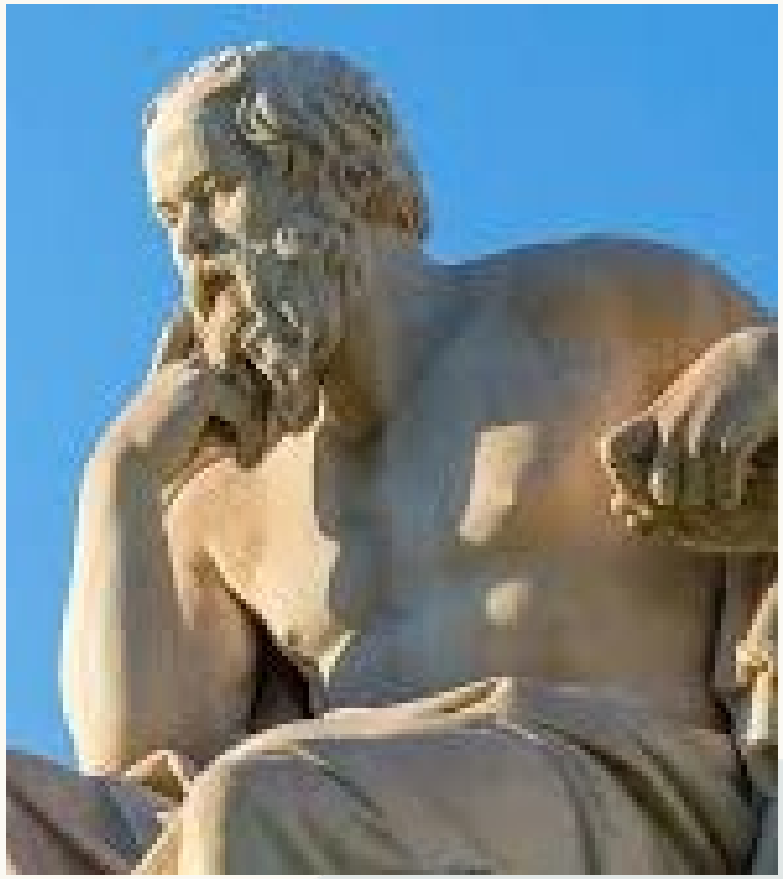
The prior administration was skeptical of mergers and intentionally created uncertainty.

> For example, treatment of informal interpretations.

The current administration seems to be returning to a "business as usual" approach.

> For example, settlements are back on the table and so is early termination of the waiting period.

What about private equity?



What are states doing?

Enforcement and legislation

State enforcement trends

- States enforcers benefitted from the prior administration's aggressive antitrust enforcement philosophy.
  - Where will states go with the new administration?

Mini-HSR regimes

- For certain healthcare transactions, several states have adopted "mini-HSR" statutes that require parties either to simultaneously submit their HSR filing to state regulators or to provide information prior to closing to allow regulators to evaluate the transaction.
  - Active regimes: CA, CO, CT, HI, IL, IN, MA, MN, NM, NV, NY, OR, RI, WA, VT
  - Proposed regimes: PA, TX
- These regimes often have lower or no thresholds.
- They can impact the timing of closing beyond even HSR.

Will there be a uniform state regime?

- Last year, the Uniform Law Commission adopted the Uniform Antitrust Pre-Merger Notification Act.
  - It's not healthcare-specific.
  - It's triggered when an HSR filing is made and requires parallel filing of the HSR filing in the adopting state if a filing person
    - has its principal place of business in the state or
    - has annual net sales in the state of at least 20% of the HSR size of transaction threshold.
- There is no waiting period.
- Legislation was introduced in DC and 7 states (CA, CO, HI, NV, UT, WA, WV).
  - Washington adopted the Uniform Act.

Thank You!

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