Antitrust and Healthcare

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Overview

- Antitrust fundamentals
- Competition among healthcare providers
- Agreements that may unreasonably restrain trade
- Exclusionary conduct and monopolies
- Information exchanges
- Tying and bundling
- Refusals to deal
- Mergers and acquisitions
- Collaborations
- Compliance guidelines and protocols
- Resources and contacts

This is not designed to make you into an antitrust lawyer. It should help you issue spot, understand problematic situations, and understand when to seek guidance.

Antitrust Fundamentals

- Antitrust laws aim to protect the process of competition
- Prohibited conduct:
  - Agreements that *unreasonably* restrain trade (Sherman Act § 1)
  - Monopolies (Sherman Act § 2)
  - Mergers and acquisitions that *may tend to substantially lessen competition* (Clayton Act § 7)
  - Unfair methods of competition (FTC Act § 5)
  - Price discrimination (Robinson-Patman Act)
- Violations can result in civil damages (including treble damages), attorneys fees, injunctions, fines, and criminal liability

Antitrust Fundamentals

- Enforcement—competition in health care is a high priority for antitrust enforcers:
  - The Department of Justice (DOJ)
    - Civil and criminal actions
  - The Federal Trade Commission (FTC)
    - Civil and administrative actions
    - Healthcare Task Force
  - State attorneys general
  - Private parties
- Relevant markets:
  - Product
- Geography

Antitrust Fundamentals

- Safe harbors
  - DOJ and the FTC each provided guidance regarding safe harbors for collaborative conduct
  - Both agencies have since withdrawn that guidance, leaving uncertainty regarding the propriety of some collaborative conduct
- DOJ believed the prior guidance was "overly permissive"

Competition among Healthcare Providers

- DOJ and the FTC recognize that healthcare providers compete in two stages:
  - First stage: competition between providers to join insurers' networks

  - Second stage: competition between in-network health care providers to provide services to the insurer's members

Agreements that May Unreasonably Restrain Trade

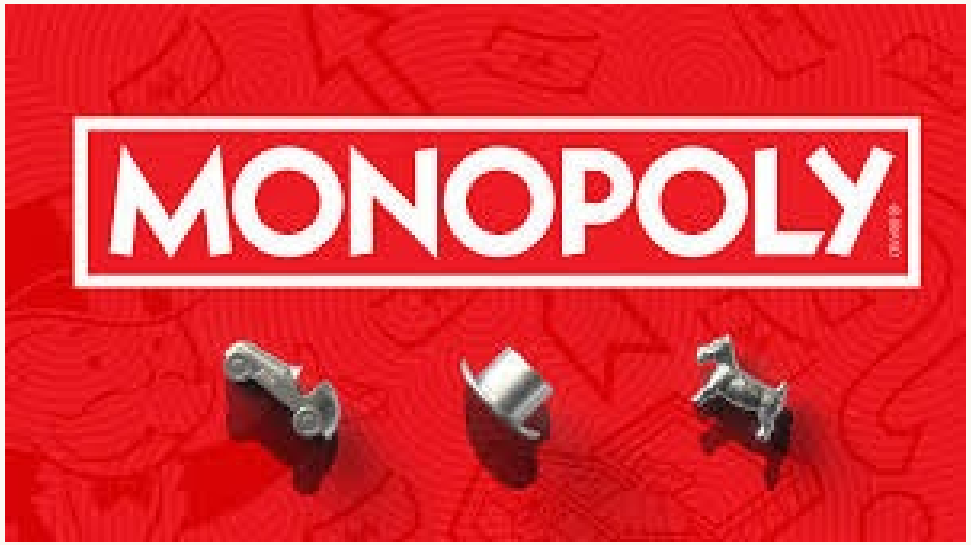
- Agreements can be informal, unwritten, or implied
- Horizontal (with competitors) or vertical (with suppliers or distributors)
- *Per se* vs. rule of reason
  - Certain agreements are considered "*per se*" unreasonable and illegal
  - All other arrangements analyzed under the "rule of reason"
    - Quick look
- Price fixing: the classic *per se* violation
  - Price or price components
  - High-risk examples in healthcare:
    - Joint rate negotiation with insurers
- Discussing prices and reimbursement rates, employee wages and benefits, or other competitively sensitive information with competitors

Agreements that May Unreasonably Restrain Trade

- Other high-risk agreements
  - Dividing or allocating markets/customers
    - Example: In *United States v. W.A. Foote Memorial Hospital*, DOJ sued a group of Michigan hospitals for an alleged conspiracy to limit marketing in each other's counties
  - Competitors boycotting or refusing to deal with a customer or supplier
    - Example: In *FTC v. Indiana Federation of Dentists*, the FTC successfully challenged the Federation's policy of collectively refusing to send dental x-rays to insurers, preventing price competition and "alternative benefits" plans
  - No-poach agreements
  - Bid rigging, including arrangements to award jobs on a rotating basis

- **Caution**: trade associations may be procompetitive but can also be misused to facilitate unlawful agreements
- Always consult counsel before engaging in joint rate-setting or collaborations, including in trade associations

Exclusionary Conduct and Monopolies



- Business practices should be properly structured to avoid antitrust risk
- Most vertical arrangements are analyzed under the rule of reason
- Generally appropriate unless likely to lead to increased prices or other significant adverse effects in a relevant market
- Risk increases with provider market dominance

Exclusionary Conduct and Monopolies

- Exclusive dealing arrangements
  - Common arrangements between hospitals and physicians
  - Common arrangements with insurers for sole network provider status
  - Example: In *United States v. United Regional Health Care System*, DOJ and Texas sued a healthcare system for using its monopoly power to force insurers into exclusive contracts
- Can be an unreasonable restraint of trade where the practical effect is to foreclose a substantial portion of the market to competition
- Risk analysis considers market share, duration, and competitive alternatives
- Require legal review, especially for healthcare entities with high market shares

Exclusionary Conduct and Monopolies

Anti-Steering: Prevents insurers from using incentives to direct patients to competitors

- Example: In *U.S. v. Charlotte Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System*, DOJ challenged healthcare system's "anti-steering" provisions that restricted health insurers from offering patients financial benefits for using less expensive services from competitors

All-or-nothing provisions: Require insurers to contract with all system providers

Exclusionary Conduct and Monopolies

Healthcare providers subject to refusal-to-deal claims involving staffing, referrals, and contracting

FTC enforcement example: Nephrologists collectively refusing to treat patients with specific insurance

Private litigation examples:
- Hospital staff privilege denials
- Physician groups refusing patient referrals

Information Exchanges

- Sharing sensitive information can be illegal or create the appearance of illegality
  - Pricing, costs, and discount information
  - Current wage and benefit data
  - Growth and strategic plans
  - Service offerings and innovations

    Benchmarking initiatives require legal supervision
- Safeguards can mitigate risks while allowing legitimate exchanges

Tying and Bundling

- Tying: Conditioning sale of desired service on purchase of additional service
  - Example: In *Jefferson Parish Hospital District No. 2 v. Hyde*, a hospital required patients to use a specific physician group to access the hospital's operating rooms
- Bundling: Offering discounts for purchasing multiple services
  - Example: In *Cascade Health Solutions v. PeaceHealth*, a hospital offered bundled discounts for primary, secondary, and tertiary care that its competitor could not match due to limited service offerings

- Again, risk increases with high market share

Refusals to Deal

- Agreements among competitors not to deal with other competitors, customers, or suppliers
  - May be *per se* illegal
  - Claims commonly arise regarding staffing, referrals, and contracting
- Example: In *In the Matter of Cooperativa de Medico Oftalmologos de Puerto Rico*, the FTC claimed that competing members of a trade association improperly agreed to refuse to deal with a health plan and network administrator to compel the insurer not to create a lower-cost provider network

Mergers and Acquisitions

- Antitrust laws prohibit mergers and acquisitions that *may tend to substantially lessen competition* (Clayton Act § 7)
- Healthcare transactions highly scrutinized by antitrust agencies
  - Horizontal mergers: Hospital-to-hospital combinations
  - Vertical mergers: Hospital-physician, hospital-insurer, provider-ancillary service arrangements
- Federal and state agencies investigate and challenge transactions
  - Agencies have authority to investigate and challenge completed transactions
- Example: In *FTC v. St. Luke's Health System, Ltd.*, the FTC challenged a hospital's completed acquisition of a physician group, which was deemed anticompetitive for increasing market power and prices and which led to a court-ordered divestiture

Mergers and Acquisitions

Some mergers and acquisitions require regulatory clearance by DOJ and the FTC under the Hart-Scott-Rodino (HSR) Act

Many states have also enacted health care merger notification regimes, commonly referred to as “mini-HSR” or “baby HSR” laws

Seek antitrust counsel to determine whether a merger or acquisition requires regulatory clearance at the federal or state level

Collaboration

- Collaborative arrangements require careful antitrust review:
  - Joint ventures and partnerships
  - Clinically integrated networks (CINs)
  - Accountable care organizations (ACOs)
  - Independent practice associations
  - Physician hospital organizations
- Competitor agreements may violate Sherman Act Section 1
- Information exchanges require legal oversight

Collaboration

- High-risk collaboration activities:
  - Joint negotiation of reimbursement rates
  - Joint marketing and advertising
  - Terms limiting competition among participants
- Clinical and financial integration can justify joint activities
- Legal structure essential for antitrust protection

Tips: Document Creation Guidelines

- Government agencies may review all internal communications in investigations
- In connection with transactions, avoid statements suggesting:
  - Intent to raise prices or reduce services
  - Eliminating competitors or competitive threats
  - High market shares or lack of competition
  - Transaction will reduce competition or increase prices
- Distribute transaction-related communications on need-to-know basis

Tips: Discussions with Competitors

- Prohibited topics:
  - Current or future prices and discounts
  - Wages, salaries, and benefit policies
  - Competitively sensitive or nonpublic information
- Prohibited agreements: Price-fixing, territory allocation, common action
- Exercise vigilance at industry conferences, trade meetings, or social gatherings

Legal Consultation Protocols

- Seek counsel before:
  - Information exchanges or benchmarking initiatives
  - Trade association meetings discussing sensitive topics
  - Contractual provisions affecting competition
- Consult immediately if:
  - Competitor suggests illegal activity
  - Receiving competitor's sensitive information
- High market share entities require heightened caution

Questions

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