ANTITRUST CONSIDERATIONS IN HEALTH CARE

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WHAT ARE WE GOING TO TALK ABOUT?

- The (very) basics of antitrust enforcement
- How antitrust enforcement works in the healthcare arena
  - Examples to help identify pitfalls and stay safe

WHO IS LOOKING AT THESE ISSUES?

- The Agencies
  - The Federal Trade Commission (FTC)
    - Group specifically to address healthcare
    - Skeptical that mergers are necessary to provide more affordable care
  - The Department of Justice (DOJ)
    - Potential to bring criminal actions (very rare in healthcare)
    - "Yates memo"
- State attorneys general
  - Frequently join FTC challenges
- Competitors

WHAT IS THE AGENCIES' GOAL?

- The goal of antitrust enforcement is improving consumer welfare by protecting competition
  - This is not the same is protecting a particular competitor
- Competition provides
  - Lower prices
  - Better quality
  - More output

WHAT ARE THE AGENCIES AND PRIVATE PARTIES LOOKING AT?

- Section 1 of the Sherman Act
  - There are three elements to a Section 1 claim:
    - A contract, combination, or conspiracy among two or more separate entities
    - That unreasonably restrains trade and
    - Affects interstate or foreign commerce

EXAMPLE

- Price fixing:
  - The Philadelphia Federation of Teachers Health and Welfare Fund sued three pharmaceutical companies alleging that they conspired to increase the price of generic “fluocinonide” a steroid used to treat certain skin conditions
  - The lawsuit claims that the generic drug makers raised prices 635 percent over two years

ANYTHING ELSE?

- Section 2 of the Sherman Act
  - Prohibits monopolization, attempts to monopolize, and conspiracies to monopolize
  - There are two elements of a Section 2 claim:
    - The respondent possesses monopoly power and
    - The willful acquisition or maintenance of monopoly power by "exclusionary conduct"
  - The FTC thinks courts are too lax in enforcing this provision of the Sherman Act
  - Not too common in healthcare

EXAMPLE

- Predatory pricing
  - In 2013, competitors started claiming that Amazon.com offered books at prices below those of its brick-and-mortar competitors.
  - Amazon would buy a book for $15, then sell it for only $10.
  - Amazon can do that because it has the staying power to continue selling books at prices below those of its competitors until it eliminates competitors.

WHAT ELSE ARE THE AGENCIES AND PRIVATE PARTIES LOOKING AT?

- The Clayton Act
  - Section 2 (as modified by the Robinson Patman Act)
    - Prohibits price discrimination in the sale of goods of like grade and quality that may cause competitive injury
    - Exemption for purchases of supplies for their "own use" by nonprofit entities, including hospitals, health systems, hospice providers, etc.
  - Section 3
    - Prohibits exclusive dealing arrangements, tying arrangements, and requirements contracts
    - Only prohibited where the effect is to substantially lessen competition

THE CLAYTON ACT, CONTINUED

- Section 7
  - Prohibits acquiring stock or assets that "may" tend "substantially to lessen competition" or "tend to create a monopoly" in a line of commerce
    - The agencies have a lot of latitude here
    - This is an "incipiency" statute
    - No time limit – challenge can come after the transaction
- Section 8 prohibits interlocking directorates
- Private parties
  - Section 4 allows private parties to sue for triple damages under the Sherman Act or Clayton Act

EXAMPLE

- Over the last year, the Department of Justice successfully blocked the mergers of Aetna and Humana and of Anthem and Cigna using Section 7 of the Clayton Act.
- Then-Attorney General Loretta Lynch: "If allowed to proceed, these mergers would fundamentally reshape the health insurance industry . . . . They would leave much of the multitrillion-dollar health industry in the hands of three mammoth insurance companies."

ANYTHING ELSE?

- Section 5 of the FTC Act
  - Prohibits "unfair methods of competition," *i.e.*, violations of the Sherman and Clayton Acts
  - The FTC uses the act to enforce antitrust laws in both civil litigation and in administrative proceedings before the FTC.

KEY TERMS

- Market: Antitrust law uses an economic definition of a "market," defining it as that area within which a firm or group of firms could profitably raise price (*i.e.*, exercise market power)
- Two types of markets to consider: Product and geographic

KEY TERMS

- Product market: A product market is an effort to identify the products and suppliers of those products that compete to some substantial degree with the product in question.
  - Courts look at a variety of factors, but the boundaries of the market are determined by the "reasonable interchangeability of use" of product.
  - Example: "Chevron with Techron" vs. other gas.

KEY TERMS

- Geographic market. Physical territory in which producers, including potential producers, are located and to which customers can reasonably turn for sources of supply.
  - The hypothetical monopolist: could she impose a "small but significant non-transitory increase in price" or "SSNIP" in the proposed market?
  - Example: To determine whether Clark County is a proper antitrust geographic market for hospital services, the fact finder asks whether the hospitals in that county could profitably raise price if they all got together in a cartel.
    - If not, add hospitals to the market until she reached the point at which the hypothetical price increase was feasible.

KEY TERMS

- Market Power: The ability to raise price or lower quality without losing so much business as to make the change unprofitable.
  - Market power can be exercised either unilaterally or through coordinated action among rivals.
  - Example: Las Vegas gas station vs. Moab.

HERFINDAHL-HIRSCHMAN INDEX

- Commonly accepted measure of market concentration
  - Market concentration on a scale from 0 to 10,000
- By the numbers:
  - <1,500 = competitive marketplace
  - 1,500 to 2,500 = moderately concentrated marketplace
  - >2,500 = highly concentrated marketplace
- Mergers that increase the HHI by more than 200 points in highly concentrated markets raise antitrust concerns due to assumed market power

PER SE AND RULE OF REASON ANALYSES

- How does a court look at potential antitrust violations?
  - *Per Se* – conduct that is illegal "per se" without a need for analysis
  - Rule of Reason – conduct that may or may not violate antitrust laws
    - "Quick look" vs. "Full Blown" review
    - Demonstrate a lack of market power or significant pro-competition benefits
    - Any proposed restraint on competition must be reasonably necessary to produce the claimed efficiency and not be overbroad
- These concepts form a continuum of analysis now

EXAMPLES

- Per se unlawful transactions
  - Naked price-fixing agreements
  - Agreements not to compete
- Rule of reason
  - Supply agreements

JOINT VENTURES

- In a joint venture, separate businesses agree to jointly provide a service or product.
  - Cartels – "naked" restraint on competition. Per se illegal.
  - Joint Ventures – rule of reason looking at "ancillary restraints."
    - (1) are possible restraints of trade subordinate and collateral to a legitimate joint undertaking?
    - (2) are they necessary to the success of that joint undertaking?
    - (3) are they no more restrictive of competition than necessary to accomplish the procompetitive ends?

EXAMPLE

- Group Purchasing Organizations
  - Efficiencies
    - Participants can obtain volume discounts, reduce transaction costs, and have access to consulting advice that may not be available to each participant on its own.
  - The agencies have set out a “safety zone” so that healthcare providers can set up group purchasing organizations without antitrust risk.

WHAT TYPES OF BEHAVIOR CREATES ANTITRUST RISK?

- Refusals to deal
  - This is a narrow behavior, only actionable where a party terminates a profitable relationship for the purpose of forcing a competitor out of the market
- Tying
- Bundling
  - Key is whether the product or service is sold below cost
- Exclusive dealing

THIS IS BORING, WHEN DO WE TALK ABOUT HEALTHCARE?

- Now

WHAT TRANSACTIONS ARE THE AGENCIES SCRUTINIZING?

- Healthcare
- Pharmaceuticals
- Energy
- Financial services
- E-commerce

WHY IS HEALTHCARE TARGETED?

- Healthcare is not especially competitive due to insurance and asymmetrical information, *i.e.*, one side to a transaction has more or better information than the other side
- Twin Goals of the Prior Administration:
  - Healthcare reform
  - Antitrust enforcement
  - Result: antitrust review in the healthcare arena is vigorous and shows no signs of letting up
- Now?

WHAT'S HAPPENING IN THE HEALTHCARE INDUSTRY NOW?

- Healthcare providers are frequently looking to consolidate or collaborate:
  1. To level the playing field with dominant insurers and
  2. To take advantage of the financial benefits offered by the Affordable Care Act (ACA) to providers that collaborate to reduce Medicare expenditures
- Payors are also looking to consolidate
- Pharmaceuticals – "pay for delay" litigation

WHAT GUIDANCE DO THE AGENCIES PROVIDE IN THE HEALTHCARE ARENA?

- The "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Share Savings Program" (Policy Statement)
- The Policy Statement gives guidance to Affordable Care Organizations (ACOs), *i.e.*, networks of doctors and hospitals that share the responsibility of providing care to a population of Medicare patients to save Medicare costs and then share in those savings

TENSION? ACA VS. ANTITRUST

- The ACA provides financial incentives to ACOs.
  - Upside: ACOs can lower health care costs
  - Downside: ACOs raise antitrust issues.
- FTC: “very concerned about the rapid rate of consolidation among healthcare providers”
  - ACA incentives furthered by state Certificate of Public Advantage (COPA) laws, which the FTC says “are misguided and risk harming consumers”

ST. LUKE'S

- St. Luke's acquired Saltzer, an independent physician group
- The FTC alleged that this acquisition included the right to negotiate health plan contracts and to establish rates and charges
- St. Alphonsus alleged that this would give St. Luke's a dominant market share and allow St. Luke's to block referrals to St. Alphonsus

ST. LUKE'S, CONTINUED

- The trial court determined that the transaction threatened competition and ordered divestiture of the acquired physician group
  - This is the first case the FTC has litigated through trial challenging a physician acquisition
- The Ninth Circuit affirmed
  - The relevant geographic market was key
  - Divestiture was the preferred remedy

ST. LUKE'S – WHAT WAS IMPORTANT?

- Note the difference in focus:
  - St. Alphonsus: acquisition would foreclose competition
    - Competition implicated by eliminating incentive to refer patients outside the acquiring group
  - FTC: acquisition gave St. Luke's the ability to extract higher rates from commercial payers

TAKEAWAYS

- The FTC is concerned about costs
  - Some hospital groups view this focus as hostile to hospitals when simplistically applied
- The FTC is concerned about reduced competition in the hospital services market
  - Generally, this appears to be central to the FTC's enforcement analysis
- The relevant market is critical to antitrust analysis.

PAY FOR DELAY

- "Reverse payments" in pharmaceuticals industry.
  - Hatch Waxman Act: incentivized generic manufacturers to sue branded manufacturers with "weak" patents
    - Unintended consequence: "reverse payment" settlements
  - Example: If a branded drug is charging $100 for a thirty day supply of pills and the generic will charge $20 when it enters, there is a large amount of monopoly profit for the two companies to "share" by "reverse payments" to settle claims
    - Win-win: Each makes far more than if the generic entered and competed.
- Widely regarded as exposing critical flaws in the intersection of patent and antitrust law

INSURANCE MERGERS

Aetna/Humana

Anthem/Cigna

AETNA/HUMANA

- Aetna announced its acquisition of Humana for $37 billion in July 2015.
- DOJ and several state attorneys general sued under Section 7 of the Clayton Act

AETNA/HUMANA, CONT.

- Keys:
  - Product Markets: The government established two main product markets: (1) individual Medicare Advantage plans; and (2) commercial plans offered on public exchanges.
    - Aetna/Humana wanted the product market to include both original Medicare and Medicare Advantage plans
  - Competition on the public exchanges: Aetna withdrew from the 17 counties where it overlapped with Humana

AETNA/HUMANA, CONT.

- Result:
  - Substantially lessen competition for Medicare Advantage plans.
  - Aetna had withdrawn from the public exchanges in the overlapping counties to evade antitrust scrutiny
- Aetna and Humana abandoned the merger.

ANTHEM/CIGNA

- Also in July 2015, Anthem announced its acquisition of Cigna, a deal valued at $54.2 billion
- DOJ and Congress investigated
  - Anthem publicized the benefits, such as the adoption of Cigna's value-based contracting experience, and argued there were minimal overlaps in local markets for all insurance products
- DOJ and several state attorneys general sued to block the merger

ANTHEM/CIGNA, CONT.

- Anthem/Cigna: the deal would offer customers more than $2.4 billion in savings through reduced reimbursement rates
  - Not surprisingly, the AMA weighed in against the merger
- The court defined the product market as health insurance to “national accounts” or customers with more than 5,000 employees
- The court then enjoined the merger, finding that it was “likely to have a substantial effect on competition in what is already a highly concentrated market”
- Anthem appealed, and the court of appeals should rule by the end of the month

TAKEAWAY NO. 1

- It's difficult to overcome narrow product markets
  - For its first step in establishing a prima facie case of anticompetitive effects for merger challenges, the government can simply show unduly high post-merger market concentration
  - Typically, the "smaller" the market, the higher the market concentration and probability of a finding of anticompetitive effects
  - In Aetna/Humana, the key was Medicare Advantage plans alone vs. Medicare Advantage plans plus original Medicare
    - "Ordinary course" documents and pricing data were key
  - In Anthem/Cigna, the product market was "national accounts," *i.e.*, customers with more than 5,000 employees
    - "Ordinary course" documents and both parties had separate business units dedicated to these customers with their own leadership and personnel

TAKEAWAY NO. 2

- Divestiture Buyers Must Be Able to Compete
  - Aetna and Humana proposed selling part of their Medicare Advantage businesses to alleviate the antitrust concerns
  - DOJ successfully argued that the divestiture would be insufficient
    - Molina was too small to compete effectively
      - Molina did not have a strong presence in the geographic markets
    - Molina's experience managing Medicaid and dual-eligible plans would not transfer to administering Medicare Advantage plans
      - Molina only had 424 enrollees in individual Medicare Advantage plans and only offered the plans in Utah in 2017
      - Under the divestiture, Molina would obtain another 290,000 enrollees
      - Molina's past efforts to enter the Medicare Advantage space failed

TAKEAWAY NO. 3

- Efficiencies are hard to prove
  - The Supreme Court has not recognized the defense
    - Most courts will at least allow evidence related to the defense
  - The Horizontal Merger Guidelines recognize the defense
- Parties must show that the efficiencies:
  1. Outweigh the anticompetitive concerns in concentrated markets
  2. Are merger-specific, in that they are directly traceable to the transaction
  3. Are verifiable and capable of proof, not simply speculative and
  4. Do not arise from reductions in output or service

HOSPITAL JOINT VENTURES

- The Susquehanna Health System: Three of the four hospitals in Lycoming County, PA, agreed to coordinate delivery of health care services
  - DOJ and the Pennsylvania Attorney General's Office investigated
  - The hospitals maintained separate ownership of certain assets, but the agreement was treated as a merger for antitrust purposes

SUSQUEHANNA HEALTH SYSTEM

- What about market power?
  - The hospitals' argument: In a stagnant market with declining hospital occupancy rates, an arrangement allowing the hospitals to coordinate the provision of health care services would result in tremendous cost savings
  - "Put up or shut up"
    - The Pennsylvania Attorney General's Office's consent decree required Susquehanna to demonstrate that the hospitals had (1) achieved a net cost savings of at least $40 million during the first five years of the decree, and (2) that at least $31.5 million of those savings had been passed on to consumers.
- The result: After 5 years, Susquehanna achieved more than $105 million in cost-savings, all of which was passed on to consumers

SUSQUEHANNA HEALTH SYSTEM

- Susquehanna was then sued by the HMO HealthAmerica Pennsylvania for running a price-fixing scheme
  - Section 1 requires (1) an agreement and (2) conduct that restrains trade
  - Susquehanna argued that it and its hospitals were a single entity that couldn't conspire or otherwise engage in concerted action
  - HealthAmerica pointed to *New York ex rel. Spitzer v. Saint Francis Hospital*, a New York case where a court had reviewed a joint operating arrangement between two hospitals, and found that their concerted action violated antitrust law

SUSQUEHANNA HEALTH SYSTEM

- Court: “substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1”
  - Management:
    - Susquehanna controlled “overall policy” and prepared “a unified budget.”
    - Hospitals had separate boards of directors and never unified operations
  - Health services subject to cooperative arrangements
    - All services
    - Hospitals only coordinated pricing and service for three specific categories of health services
  - Employees
    - Most employees of Susquehanna rather than a component hospital
    - Hospitals had separate medical staffs

SUSQUEHANNA HEALTH SYSTEM

- Court: “substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1”
  - Capitalization and debt
    - Susquehanna hospitals assist each other in meeting bond covenant requirements, and hospitals cannot incur new debt without authorization from Susquehanna
    - Separate
  - Acquisition of property
    - Hospitals share a capital budget, and cannot buy, lease, or sell property without authorization from Susquehanna.
    - The hospitals could and did undertake capital spending independent of one another
  - State regulatory approval
    - Pennsylvania Attorney General approved by consent decree a complete integration and coordination of operations
    - New York regulators contemplated coordination only with respect to three services

SUSQUEHANNA HEALTH SYSTEM

- Based on this analysis, the court found that "the hospitals in Saint Francis remained independent decisionmakers, while the defendant hospitals in the instant case are controlled by a single decisionmaker, Susquehanna."
  - Thus Susquehanna was a single entity for antitrust purposes, and its components could not engage in concerted action

SUSQUEHANNA HEALTH SYSTEMS

- The *Saint Francis* court described itself as "acutely sympathetic with defendants' struggle to survive so that they may continue providing quality medical services to their shared community" and recognized that "smaller hospitals have found it increasingly difficult to raise funds for…necessary capital investment"
  - Still, the court condemned the price fixing and market allocation provisions of the hospitals' agreement as *per se* violations

Penn State Hershey Medical Center and PinnacleHealth System

Advocate Health Care Network and NorthShore University Health System

Cabell Huntington Hospital and St. Mary's Medical Center

PENN STATE HERSHEY MEDICAL CENTER

- Hershey and Pinnacle announced a proposed merger in June 2014
- FTC commenced administrative proceedings against the transaction and, with the Commonwealth of Pennsylvania, sought a preliminary injunction in US District Court
  - The injunction would force the case to an FTC administrative law judge
  - FTC lost, but successfully appealed
- The key was the geographic market and the hypothetical monopolist:
  - Focus on insurers not patients as the district court did
  - The district court had rejected to be based principally on analyzing patient flows
    - Beer
  - Court of appeals: "relying solely on patient flow data is not consistent with the hypothetical monopolist test"
  - Insurers relied on competition between Hershey and Pinnacle and could not successfully market a plan in the area without Hershey and Pinnacle

PENN STATE HERSHEY MEDICAL CENTER

- Payer Contracts
  - District court: Hospitals had contracted with key payers to maintain rate structure for 5 years
    - Because these agreements maintain the pricing status quo, the court could not predict the impact of the transaction
  - Court of appeals: Section 7 of the Clayton Act requires courts to predict the future, and private pricing agreements "have no place in the antitrust analysis we engage in today"
- Efficiencies
  - Court of appeals questioned the existence of the defense, but found that, in a highly concentrated market, "extraordinarily great cognizable efficiencies are necessary. That standard was not met here"
  - The claimed efficiencies—avoidance of capital investment in additional beds by Hershey and enhanced ability to engage in risk-based contracting—failed
    - The need was ambiguous, and failing to invest in additional capacity is potentially an anticompetitive reduction in output
    - The risk-based contracting claims were not necessarily merger-specific, had not been demonstrated to result in benefits that would be passed on to consumers, and were too speculative

PENN STATE HERSHEY MEDICAL CENTER

- ACA
  - District Court:
    - Considering the importance of "the evolving landscape of healthcare," the climate created by government health care policy "virtually compels institutions to seek alliances such as the Hospitals intend here"
  - Court of appeals: "Opining on the soundness of any legislative policy that may have compelled the Hospitals to undertake this merger is not within our purview"
- The parties abandoned the merger

ADVOCATE AND NORTHSHORE

- The merger of Advocate and NorthShore would have created the eleventh largest nonprofit health system in the United States
- The FTC filed an administrative proceeding, and the FTC and the State of Illinois filed suit in US District Court to enjoin the merger
  - Advocate and NorthShore won at the district court, but the court of appeals reversed

ADVOCATE AND NORTHSHORE

- Market share:
  - The court noted that Advocate and NorthShore together would have operated six out of 11 inpatient hospitals in the "North Shore" area and would have held a 60% market share of patient admissions, but concluded that the most relevant "buyers" of health care are insurers, not individuals, because insurers must bargain with health systems for inclusion in provider networks
  - It would be impossible to market health insurance in the North Shore area without either Advocate or NorthShore in the provider network
  - The merger would increase the average price for general acute inpatient services by 8%, with $45 million in additional revenue to the health systems

ADVOCATE AND NORTHSHORE

- Advocate and NorthShore: merger would lower costs for patients and insurers
  - Cost-saving, risk-based contracts across both health systems
    - NorthShore relies on traditional fee-for-service contracts (90% of its revenues), while Advocate obtains more than 2/3s of its revenues from risk-based contracting
    - NorthShore could provide health care with the benefit of Advocate's risk-based contracting experience and engage in "large-scale full risk contracting"
  - Scale and geographic coverage to offer an ultra-narrow-network in the North Shore area directly to employers, cutting out insurers as middlemen

ADVOCATE AND NORTHSHORE

- Counter:
  - Illinois's Certificate of Need process is lengthy and uncertain, providing a key barrier to entry to counteract anticompetitive effects of the merger
  - Advocate and NorthShore upgraded facilities and invested in technologies to remain competitive with each another, a benefit that could have been lost
  - Inpatient hospital care is a local industry because patients often prefer to seek care close to home, so the relevant geographic markets are often small

ADVOCATE AND NORTHSHORE

- Takeaways
  - First, the effects on health insurers, not patients, as the main purchasers of health care services appear to be the crux of the analysis
  - Second, because patients (and, by extension, health insurers) generally purchase health care locally, the geographic market for analyzing anticompetitive effects of a merger may be small, spanning only a few counties or so
- Advocate and NorthShore abandoned the merger

CABELL HUNTINGTON AND ST. MARY'S

- Cabell Huntington announced the acquisition of St. Mary's Medical Center in Huntingon, West Virginia
- Hospitals and West Virginia Attorney General agreed to conditions on rate limitations, market entry, efficiencies, and preservation of St. Mary's as an institution

CABELL HUNTINGTON AND ST. MARY'S

- The FTC disagreed with West Virginia:
  - Rate limitations consisted of price controls shown to be ineffective,
  - Entry or expansion by other providers is unlikely to occur in a timely manner, and
  - The hospitals' efficiency and quality claims were not verifiable and not merger specific
- The FTC filed an administrative complaint, alleging that, in several counties in West Virginia and Ohio, the combined entity would have:
  - More than 75% of the market for general acute care inpatient services and
  - A high share of the market for outpatient surgical services
- With high market shares/HHI market concentration, the merger was presumptively unlawful

CABELL HUNTINGTON AND ST. MARY'S

- West Virginia steps in:
  - West Virginia legislature passed a Certificate of Public Advantage (COPA) law
  - COPA laws exempts health institutions from federal antitrust scrutiny (1) upon clearly articulated state approval and (2) provided that a state agency actively monitors the deal

CABELL HUNTINGTON AND ST. MARY'S

- FTC dismissed its complaint after the West Virginia Health Care Authority approved the merger
- FTC concerns: COPA laws generally "are likely to harm communities through higher healthcare prices and lower healthcare quality"
  - Procompetitive collaborations are already permissible under the antitrust laws, so COPA laws immunize conduct that won't generate efficiencies

CONCLUSIONS

- Antitrust analysis does not lend itself well to bright lines
- The agencies want to protect and encourage competition
- For the foreseeable future, the agencies will focus on healthcare

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