ANTITRUST AND HEALTHCARE

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(09-28-18)

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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 you 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 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 Obama Administration:
  - Healthcare reform
  - Antitrust enforcement
- Result: antitrust review in the healthcare arena is vigorous and shows no signs of letting up under the Trump Administration

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
  - Examples include price fixing, market division, boycotts or concerted refusals to deal, and tying arrangements

EXAMPLE

- Price fixing:
  - Agreements among competitors that fix, raise, lower, or stabilize prices are *per se* unlawful
    - The reasonableness of the price is irrelevant
  - Example:
    - In *Arizona v. Maricopa County Medical Society*, the US Supreme Court found that an agreement among competing physicians to set maximum prices they would accept from insurers was *per se* unlawful price fixing

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
    - 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

CASCADE HEALTH SOLUTIONS V. PEACEHEALTH

- Cascade, a small community hospital, sued a larger health system, Peacehealth, alleging that Peacehealth improperly bundled discounts
  - Peacehealth agreed to discount the costs of its tertiary hospital services if the county's main managed care plan made Peacehealth its exclusive provider for primary and secondary hospital services.
  - Cascade only provided primary and secondary hospital services.
- Jury found in favor of Cascade.
- The Ninth Circuit vacated the jury verdict, saying Cascade needed to prove that Peacehealth could only have provided the bundled discounts by offering services below its costs.
  - This "discount allocation" standard would assume that the discounts were allocated entirely to the primary and secondary hospital services.

WHAT ELSE ARE THE AGENCIES AND PRIVATE PARTIES LOOKING AT?

- The Clayton Act
  - Section 2 (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
    - This is an "incipiency" statute
    - The agencies have a lot of latitude here
    - 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

EXAMPLES

- DOJ 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.
  - Could a hypothetical monopolist impose a “small but significant non-transitory increase in price” or “SSNIP” in the proposed market?
  - Courts look at a variety of factors, but the boundaries of the market are determined by the “reasonable interchangeability of use” of product.
  - Example: Challenging Aetna’s proposed acquisition of Prudential, the DOJ defined the market as the sale of managed care products such as health maintenance organization (HMO) and point of service (POS) products, and excluding indemnity or preferred provider organization (PPO) products

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.
  - Again, could a hypothetical monopolist impose a SSNIP in the proposed market?
  - Example: To determine whether Laramie County is a proper antitrust geographic market for primary and secondary hospital services, ask 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 the hypothetical price increase is 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: Gas stations

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 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
- 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.

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

WHAT'S HAPPENING IN THE HEALTHCARE INDUSTRY NOW?

- Healthcare providers looking to consolidate or collaborate:
  1. To level the playing field with dominant insurers
  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 horizontally and vertically
- 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

Cabell Huntington Hospital and St. Mary's Medical Center

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
  - 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

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

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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