



# Antitrust Considerations in Healthcare

Cory A. Talbot  
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# What are we going to talk about?

- The basics of antitrust enforcement
- How antitrust enforcement works in some areas of the healthcare arena
  - Group purchasing organizations
  - Joint negotiating
  - Boycotts
  - Information exchanges

# 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 as protecting a particular competitor
- Competition provides
  - Lower prices
  - Better quality
  - More output

# What statutes are the agencies and private parties looking at?

- Federal and state statutes
- 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

# 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.”

# The Clayton Act, cont.

- Section 8 prohibits interlocking directorates
- Private parties
  - Section 4 allows private parties to sue for triple damages under the Sherman Act or Clayton Act

# 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)
  - The hypothetical monopolist and “SSNIP,” or “small but significant non-transitory increase in price”
- 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: all automobiles vs. 4-wheel drives
  - Analysis complicated by insurers in healthcare

# 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 SSNIP in the proposed market?
  - Example: To determine whether Clark County is a proper antitrust geographic market for 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 it reaches 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.

# *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.
  - “Safety zone”
    - Purchase are less than 35% of the total sales of the product or service in the relevant market and
    - The cost is less than 20% of the total revenue of all products or services sold each participant.

## Example, cont.

- Even if outside the safe harbor, group purchasing organizations are probably safe if:
  - Members are not required to use the arrangement for all purchases of a particular product or service;
  - The organization's negotiations are conducted by an independent employee or agent; and
  - Communications between the organization and each individual participant are kept confidential.

# 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
  - The chair of the FTC said that antitrust enforcement in the healthcare arena is one of the agency's highest priorities
- 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

# Tension – ACA vs. Antitrust

- The ACA provides financial incentives to ACOs.
  - The upside is that, done correctly, they can lower health care costs
  - The downside is that, while it's early, they raise the specter of antitrust issues.
- Former FTC commissioner Julie Brill: “Indeed, the goals of the ACA and antitrust enforcement are aligned and compatible”
  - Is that right?
- Former FTC commissioner Edith Ramirez said that she is “very concerned about the rapid rate of consolidation among healthcare providers”
- What about state interests?
  - ACA incentives are furthered by state Certificate of Public Advantage (or COPA) laws, which “are misguided and risk harming consumers”

# What guidance do the agencies provide in the healthcare arena?

- A lot
  - Statement of Antitrust Enforcement Policy in Healthcare (Policy Statement)
  - The Policy Statement gives guidance on a number of antitrust issues

# Information exchanges

- The Policy Statement provides a “safe harbor” for providers to exchange information.
- The scope of the safe harbor depends on the sensitivity of the information
- General principles:
  - Managed by a third party
  - More than three months old
  - Aggregation

# Vertical Acquisitions

- Historically, this has not been a key focus for the agencies
- Vertical combinations are generally less of an antitrust concern than horizontal combinations
  - Competition is the key
  - For example, hospitals and physicians do not typically compete with each other
  - Multiple acquisitions raise concerns

# 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 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.

# Boycotts

- Agreement among competitors not to deal with other competitors, customers, or suppliers
- *Per se* illegal in several situations:
  - Agreement among competitors to deny access to a necessary supply, facility, or market
  - Boycott by dominant position in the relevant market
  - Refusal to deal unless a specified price is paid for the good or service

# Boycotts, cont.

- Outside those situations, boycotts are still examined under the rule of reason.
- Frequent issue in healthcare in many situations such as denial or termination of staff privileges, efforts by providers to prevent entry of managed care programs into a market, etc.

# Joint negotiations

- The Agencies have provided guidance for joint negotiations
- Keys
  - Shared financial risk
  - Clinical integration

# 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



**Cory A. Talbot**

Holland & Hart LLP

801.799.5971

[catalbot@hollandhart.com](mailto:catalbot@hollandhart.com)

222 South Main Street , Suite 2200

Salt Lake City, Utah 84101