ANTITRUST AND HEALTHCARE: INCREASED SCRUTINY IN A CHANGING WORLD

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ANTITRUST LAWS PROTECT COMPETITION

- "The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace."
  - Department of Justice Antitrust Division's "Mission" (https://www.justice.gov/atr/mission)
- "Free and open markets are the foundation of a vibrant economy. Aggressive competition among sellers in an open marketplace gives consumers — both individuals and businesses — the benefits of lower prices, higher quality products and services, more choices, and greater innovation. . . . These laws promote vigorous competition and protect consumers from anticompetitive mergers and business practices."
  - Federal Trade Commission's "Guide to Antitrust Laws" (https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws)

OVERVIEW

- Key Terms
- The basics of antitrust enforcement
  - The agencies
  - The law
- How antitrust enforcement works in some areas of the healthcare arena
  - Group purchasing organizations
  - Joint negotiating
  - Boycotts
  - Information exchanges
  - Mergers and acquisitions
- What's Next?

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 has been 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 Salt Lake County is a proper antitrust geographic market for hospital services, ask whether the hospitals in that county could profitably raises price if they were in a cartel.
    - If not, add outlying 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 profitably by restricting output.
- Can you 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.

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
    - Rare, but not unheard of
- State attorneys general
  - Frequently join FTC challenges
- Competitors

WHAT ARE THE AGENCIES' AIMS?

- 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

STATE LAWS AND THE SHERMAN ACT

- 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: SHERMAN ACT SECTION 1

- Price fixing:
  - In 2016, 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
  - The litigation has since expanded, and plaintiffs recently asked the Court for leave to sue additional defendants

THE SHERMAN ACT SECTION 2

- 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: SHERMAN ACT SECTION 2

- 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.

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
- 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: THE CLAYTON ACT

- Over 2016 and 2017, 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."

EXAMPLE: THE CLAYTON ACT

- 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
  - The court determined that the transaction threatened competition and ordered divestiture of the acquired physician group
    - The relevant geographic market was key
    - Divestiture was the preferred remedy
  - What was important?
    - St. Alphonsus: acquisition would foreclose competition, eliminating incentives to refer patients outside the acquiring group
    - FTC: acquisition gave St. Luke's the ability to extract higher rates from commercial payers

EXAMPLE: THE CLAYTON ACT

- Merger of Thomas Jefferson University and Albert Einstein Healthcare Network
  - FTC lost based on witness credibility and issues surrounding how markets were defined
  - Lessons
    - Illustrates the importance of the "hypothetical monopolist" to the FTC
    - Political aspects may have played a role

THE CLAYTON ACT

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

AGENCY GUIDANCE

- The agencies have provided guidance regarding antitrust laws
  - Statements of Antitrust Enforcement Policy in Health Care
    - https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf
  - Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations
    - https://www.ftc.gov/policy/federal-register-notices/ftc-doj-enforcement-policy-statement-regarding-accountable-care
  - Overview of FTC Actions in Health Care Services and Products
    - https://www.ftc.gov/system/files/attachments/industry-guidance/20201231_overview_health_care_updated_v2.pdf

AGENCY FOCUS ON HEALTHCARE

- 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
- The FTC at least has made clear that antitrust enforcement in the healthcare arena is one of the agency's highest priorities
- Bipartisan support for increased antitrust enforcement
- Result: antitrust review in the healthcare arena is vigorous and shows no signs of letting up

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
  - Naked no-poach 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
  - "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
  - Even if outside the safety zone, 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

MERGERS

- Healthcare providers are frequently looking to consolidate:
  - To level the playing field with dominant insurers and
  - To take advantage of the financial benefits offered by the Affordable Care Act (ACA) to providers that collaborate to reduce Medicare expenditures
- Healthcare mergers face heightened scrutiny
  - States are beginning to get involved in merger clearance

INFORMATION EXCHANGES

- The Statements of Antitrust Enforcement Policy in Health Care provide 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 then horizontal combinations
  - Competition is the key
  - For example, hospitals and physicians do not typically compete with each other
  - Multiple acquisitions raise concerns

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
- Outside those situations, boycotts are still examined under the rule of reason.
- Frequent issue in healthcare in 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
  - Financial integration: shared financial risk
  - Clinical integration: coordination of care

CERTIFICATES OF PUBLIC ADVANTAGE

- Several states provide for Certificates of Public Advantage or COPAs
  - What is a COPA?
    - State approves mergers that reduce competition
    - In return, the hospital commits to make investments that will benefit the public and to control cost growth for health care
    - Preempts federal antitrust enforcement
  - FTC: these laws "are misguided and risk harming consumers"
  - Good or bad?
    - Depends on the context
    - Successful in rural areas that lack adequate infrastructure

WHAT'S NEXT?

- Broad bipartisan support for antitrust reform, although, not surprisingly, differing views on what that means
- Senator Amy Klobuchar (D-MN) has proposed "CALERA," the Competition and Antitrust Law Enforcement Reform Act of 2021
  - Replace the Clayton Act's standard for prohibited mergers
    - Prohibiting mergers that "substantially lessen competition" becomes "create an appreciable risk of materially lessening competition"
  - Clayton Act would expressly apply to monopsony power, *e.g.*, Amazon
  - Shifting the burden: In certain situations, merging parties would have to demonstrate that their merger would not "create an appreciable risk of materially lessening competition"
  - Broaden the definition of "market power"

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

QUESTIONS?
NEED MORE INFORMATION?

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