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Antitrust Issues in the Managed Care World

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Society of Managed Care Professionals

Trends in Health Care Industry

- Integration / Consolidation of Hospital Systems
- Physician / Hospital Integration
- Consolidation / Integration of Payors



Impact of Health Care Reform

- Hospitals, physicians and other health care providers being encouraged and incentivized to work more closely together
- More Government and public focus on cost of health care
 - What does it cost?
 - Who is paid what?
 - Who makes what?



Why Talk About Antitrust?

- Health Care Reform Encourages Provider Collaboration
 1. Accountable Care Organizations
 2. EHR Incentives
 3. Market Reaction to Reform: Greater Integration Among Providers
- KEY: Anytime competitors combine or agree (that is, cooperate and integrate), antitrust laws must be considered.



Basics of Antitrust

- Purpose
 - Protect competition
 - Promote low prices, high output, high quality and efficiency
 - Antitrust laws protect competition not competitors
 - Challenged conduct must adversely affect market-wide competition and consumers
 - Increased effect on market power increases chances of anti-competitive effect



Basics of Antitrust

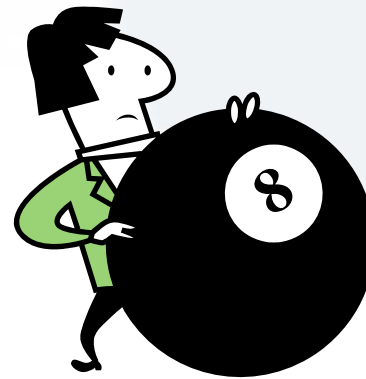
- Types of Antitrust Problems

- Collusion:

- Consumers are direct target
 - e.g. price fixing arrangements

- Exclusion

- Direct targets are competitors and consumers are indirect targets
 - e.g., refusal to deal



Antitrust Statutes

- **Sherman Antitrust Act (enacted 1890)**
 - Section 1
 - Prohibits agreements unreasonably restraining competition
 - “every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states...is hereby declared illegal.”
 - Practices that are “per se” illegal
 - » Price fixing
 - » Market allocation
 - » Boycotts
 - » Civil and Criminal Statute
 - Penalties
 - Section 2 – Prohibits monopolization, attempted monopolization, and conspiracies to monopolize.



Antitrust Statutes

- **Clayton Act Section 7:** Prohibits all types of acquisitions that may substantially lessen competition.
- **The Robinson Patman Act:** Prohibits certain discriminations in pricing and services.
- **Section 5 of the Federal Trade Commission Act:** Prohibits unfair methods of competition and applies to persons, partnerships, or corporations organized to carry on business for their own profit or that of their members.



Antitrust Enforcement

- Antitrust laws are enforced by:
 - The antitrust division of the United States Department of Justice
 - The Federal Trade Commission
 - State attorneys general
 - Private parties injured by antitrust violations



Current Issues in Antitrust

- **Government Enforcement**
 - **Obama Administration:** During his campaign President Obama promised increased focus on antitrust enforcement. He has fulfilled that promise.
 - Introduced pro-enforcement leadership at DOJ Antitrust Division



Current Issues in Antitrust

Christine Varney head of DOJ Antitrust Division:

- Former FTC commissioner
- Condemned “passive” antitrust enforcement under Bush Administration
- As FTC commissioner, opposed legislation that would grant physicians’ immunity to collectively set fees and receive immunity for boycotts or price-fixing as long as it promotes quality
- Health care will be a focus



Current Issues in Antitrust



– Recent DOJ Activities

- Repudiated lenient monopolization enforcement policy from the Bush Administration and promised vigorous healthcare antitrust enforcement
- Collected \$1 billion in criminal fines FY 09; in addition convicted an antitrust violator to an unprecedented 48 month sentence

– Recent FTC Activities

- Brought price-fixing charges against Alta Bates Medical Group, Inc., a 600-physician independent practice association for fixing prices charged to health care insurers and unlawful concerted refusal to deal, defendants settled
- Brought price-fixing charges against Roaring Fork Valley Physicians IPA for price fixing against health insurers. Roaring Fork agreed to halt its alleged anti-competitive activities

Current Issues in Antitrust



- **Congressional Activities**
 - Amendment of False Claims Act expands liability to third parties who do not deal directly with the government. Many antitrust claims involving sales to the government also include FCA allegations.
 - Members of U.S. Senate Judiciary have threatened a repeal of the McCarran-Ferguson Act (insurers' exemption from certain antitrust laws).

Current Issues in Antitrust

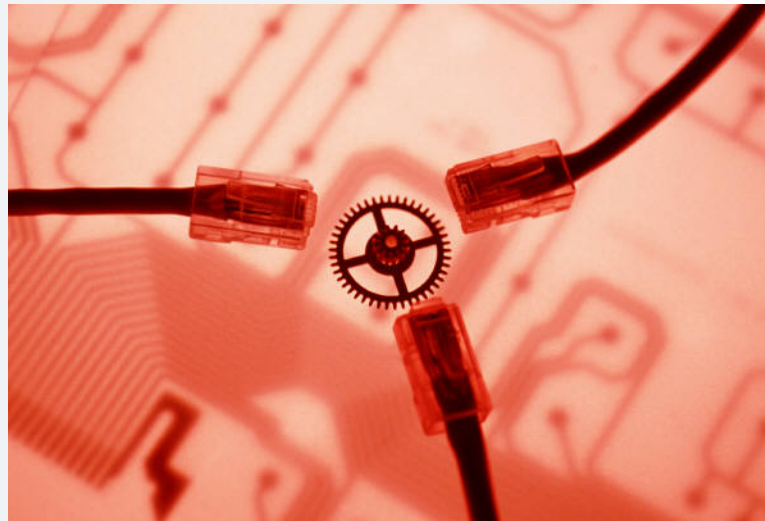


- Government tolerates certain behavior ordinarily viewed as anti-competitive, but only to effectuate legitimate purposes of a Joint Venture
- “Where purported efforts to integrate are principally a vehicle for obtaining and exploiting market power or simply a subterfuge for price fixing,” then FTC and DOJ will take action to protect competition and consumers.

- Christie A. Varney, May 24, 2010 Speech to ABA/AHLA Antitrust in Healthcare Conference (emphasis added)

Two Types of Integration for Healthcare JVs

- Financial Integration
- Clinical Integration



Financial Integration

- **KEY: Sharing of Substantial Financial Risk**



- Capitulated payment by JV
- Provision of services by JV for percentage of premiums or revenues for a plan
- Use by JV of significant financial incentives for GROUP to achieve specific cost containment goals. Incentives include:
 - Withholds administered by JV
 - Financial rewards or penalties administered by plan
- Agencies: “New type of risk sharing arrangements may develop.”
- Use expedited business review/advisory opinion process if uncertain if your venture has sufficient financial risk sharing.

Clinical Integration



- “Active and ongoing program to evaluate and modify practice patterns by the network’s physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality”. 1996 FTC/DOJ Statements on Healthcare Antitrust Enforcement Policy
 - FTC has approved 4 clinically integrated physician networks:
 - TriState Health Partners, Inc. (2009)
 - Greater Rochester Independent Prac. Assoc. (2007)
 - MedSouth, Inc. (2002, 2006)
 - Suburban Health Organization (2002)

Current Issues in Antitrust



- Electronic Health Records (EHR) provide an ideal platform to develop a clinical integration plan.
 - » Stimulus bill includes substantial financial incentives for providers to implement EHR.
 - \$2 mill + enhanced Medicare reimbursement for hospitals
 - \$44,000 for physicians
 - » EHR will help meet the guidelines for Clinical Integration
- **Legislative Assistance**
 - Federal: Congress has considered bills that would permit physicians and other providers to bargain collectively with payers.
 - States: Texas has enacted a similar provision to allow providers to bargain collectively. Other states including NJ, Washington and NY have considered similar provisions.



Current Issues in Antitrust



- **Conflicting Messages**
 - **Two Dynamics: Quality vs. Price-fixing**
 - **Quality:** Health Reform and Stimulus bills both put an emphasis on providers working together to improve the quality of care for patients.
 - **Price-fixing:** Government is also keenly focused on prosecuting and eradicating price-fixing and other anti-competitive behavior amongst providers. This enforcement focus limits providers' ability to work together.
 - Which policy position will ultimately win the day?

Methods for Providers to reduce antitrust risks

- Qualify for an Antitrust Safety Zone
 - 1996 Statements of Antitrust Enforcement Policy in Health Care
 - Issued jointly by DOJ and FTC: provides guidance to providers in 9 statements. Statements 4-6, 8 & 9 are applicable to managed care.
- Qualify for Rule of Reason Analysis
- Obtain Advisory Opinion Business Review Letter
- SC Certificate of Public Advantage (COPA)
- Be careful about statements of purpose and all forms of communications



Antitrust Safety Zones



- Statement 4: Provider’s Collective Provision of Non-Fee Related Information to Purchasers of Health Care Services (MCOs)
 - Medical Data provided collectively by Providers to MCOs to help resolve issues related to mode, quality, or efficiency of treatment:
 - Example: State medical society collects from its members outcome data about a particular procedure that they believe should be covered and provides information to MCOs.
 - Medical Data intended to assist providers with clinical decision making (Clinical Protocols).

Antitrust Safety Zones



- Statement 5: Providers' collective provision of fee info to MCO
 - Allows providers to collectively provide MCOs factual information concerning
 - Current or historical fees
 - Reimbursement Methods Accepted
 - 3 Standards:
 - 3d Party manages collection
 - No sharing of current or future fees among competing providers
 - If collective data is made available to providers furnishing individual data then:
 - » At least 5 Providers
 - » No Single Provider's data is more than 25% of Collective Data
 - » The way the Collective Data is presented cannot allow an individual provider to determine current prices of its competitors

Antitrust Safety Zones

- Statement 6: Providers' exchange of price and cost info
 - Competing providers participate in surveys of prices for healthcare services or surveys on compensation
 - Can be procompetitive by enabling providers to price services competitively and to pay competitive compensation
 - Safety Zone standards same as Statement 5



Antitrust Safety Zones

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- Statement 8: Physician Network Joint Ventures (PNJV)
 - Exclusive or Non-exclusive:
 - Exclusive PNJV won't be challenged if:
 - » Physicians share substantial financial risk
 - » the network constitutes 20% or less of the physicians in each physician specialty with active hospital staff privileges who practice in the relevant local geographic market
 - Non-exclusive won't be challenged if:
 - » Physicians share substantial financial risk
 - » the network constitutes 30% or less of the physicians in each physician specialty with active hospital staff privileges who practice in the relevant local geographic market

Rule of Reason Analysis

- Rule of Reason: will the network have substantial anticompetitive effect, and, if so, will that potential effect be outweighed by any procompetitive efficiencies resulting from the joint venture?
- Analysis takes into account:
 - Define the relevant market
 - Evaluate the competitive effects of the joint venture
 - Evaluate the impact of the procompetitive efficiencies
 - Evaluate any collateral agreements
- Financial and Clinical Integration efforts should trigger RoR analysis



Advisory Opinions / Business Review Letters

- Advisory Opinion Requests are submitted to FTC (16 C.F.R. § 1.1-1.4)
 - Requests should be submitted in writing (one original and two copies to the Secretary of the Commission)
 - State the question clearly
 - Cite the provision of law under which the question arises
 - Hypothetical questions will not be answered
- Business Review Letter requests are submitted to the DOJ (28 C.F.R. § 50.6)
 - Requests must be submitted in writing to the Assistant Attorney General, Antitrust Division, Dept. of Justice, Washington, DC 20530
 - Requesting party must make a full and true disclosure of the business conduct
 - Request must be accompanied by all relevant data
 - DOJ will also conduct any independent investigation it deems appropriate
- Obtaining Advisory Opinions can be a lengthy and costly process
 - Process typically entails at least a 90-day review period prior to agency issuing its guidance



In South Carolina obtain Certificate of Public Advantage (COPA)

- DHEC may grant approval to agreements that may be prohibited by federal and state antitrust laws where it determines that such agreements are beneficial to South Carolinians
- Currently Palmetto Health and Regional Health Plus have COPAs
- DHEC monitors COPA projects



Antitrust Enforcement Trends

Possible areas of activity

- Review most favored nation concepts
- Use of Civil Investigative Demands (CID's) against trade associations

