

# **Antitrust Duality: Vindicating Rights and Assuring Compliance**

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## Antitrust Overview

- **State and federal antitrust laws prohibit monopolistic conduct and agreements that restrain trade**
- **Plans must avoid improper agreements with competitors on price, customers, markets or other terms of dealing, and must avoid practices that suppress competition in dealings with providers or customers**
- **Plans must also know their rights under the antitrust laws.**
- **Limited exemption for some “business of insurance” activities if “regulated” by the state, but not “boycotts” “coercion” or “intimidation – don’t count on protection**

## Who Enforces?

- **U.S. Government – Department of Justice Antitrust Division and the Federal Trade Commission**
- **State attorneys general**
- **Private plaintiffs**
  - **New provider class action lawsuits in Kansas and Missouri**
  - **Similar to suits previously filed in Ohio and Kentucky**
- **State insurance departments have similar authority**

## Risks of Non-Compliance

1. **Employment sanctions**, including termination
2. **Criminal sanctions**, including up to ten years in prison and/or substantial fines
3. **Actions against the plan**, including investigations, class actions and other lengthy, expensive proceedings
4. **Large civil damage awards**, including plaintiff's attorney fees
5. **Disclosure of confidential commercial information** through the legal process
6. **Lost time** for staff who need to search document files and prepare and testify in legal actions
7. **Business losses** resulting from required alterations in business relationships or contracts

## **Larger Antitrust Penalties**

**Congress has enacted tougher penalties for criminal antitrust violations:**

- **Maximum prison sentences are now ten years, rather than three**
- **Maximum fines for individuals are now \$1 million, up from \$350,000**
- **Maximum fines for corporations are now \$100 million, up from \$10 million**

## Other Risk Factors

- **Private plaintiffs can collect triple damages and get their attorneys fees reimbursed**
- **Government enforcers may learn of violations from customers, providers and competitors, including firms trying to get a better deal by self-reporting**
- **Consolidation is sparking greater enforcement focus on managed care companies**

## **Key Compliance Focus : Avoiding Collusion**

**Antitrust laws prohibit:**

- 1) Collusion -- agreements that restrain competition**
- 2) Monopolization and attempted monopolization**
- 3) Anticompetitive mergers**

The first is the main focus of this session, because it's the most likely risk area in everyday operations.

# Collusion





# Collusion

- **Collusion is agreement, usually between competitors, that restrains competition. It can involve sellers OR buyers.**
- **Evidence must show mutual understanding to accomplish a common purpose.**
- **Finding collusion does NOT require: (1) express, written, or formal agreements, (2) meetings, or (3) statement of purpose, detailed plan, or specific agreement on means to carry out plan. Informal “signaling” can be the method.**
- **Sharing confidential information can be used as evidence to prove conspiracy**
- **Some restraints “per se” unlawful – legality of others more dependent on market analysis, such as bona fide joint ventures**

## Blue plan – Blue plans

- Blue plans participate jointly in Blue initiatives, such as Blue Card program.
- Blue plans and their affiliates may also be competitors with other Blue plans or their affiliates
- Activity and communications that may be legitimate as part of integrated joint endeavor, or as protection for Blue brands, may not be legitimate where outside that context
- Thus, similar activity, but different context, may alter risk analysis
- Also, should not assume that plans will be viewed as not being competitors

## Big Don'ts

- **Price-fixing** – agreement between competitors on **ANY** element of price
- **Bid rigging** – agreeing to fix or rig responses to a customer's request for proposals
- **Customer allocation** – agreeing which firm will do business with which customers

# Slip Sliding Away

- **It's OK because it's in the minutes**
- **It's OK because it's not in the minutes**
- **Let's all unilaterally set rates at . . . .**
- **Thanks for the antitrust presentation.  
Now, let's get back to business . . .**

## A Cautionary Tale of Realtors

- Annual dinner meeting
- President's address
- “Costs up; my fees going up to 7%”



## Example 1: “Checking” on rates

- Carl from the Savvy Provider tells Barry from the Blue Plan that the Blue Plan’s rates are low, because the Big Plan and the Other Plan are paying more.
- Harry calls his friends Lou and Sue at the other plans to find out what they are paying the Savvy Provider.
- He finds out they are paying more than the Blue Plan, but that they haven’t decided yet what increase to make for 2005.
- Harry tells them that the Blue Plan is planning a five percent increase, so that if they hold their rates to a 2% or less increase, there will be parity. They do.

***Has the Blue Plan violated the antitrust laws?***

A. No, the Blue Plan didn’t change what it planned to do.

B. No, because Savvy Provider brought up the other plans’ rates.

C. Very possibly.

## Example 2: Sharing rate terms

- Middletown Hospital is very costly. A major cause is the outlier exceptions from the per diem rates in the hospital's contract, requiring reversion to charges-based payment rates.
- Matt from the Blue Plan runs into his friend Phyllis, who works at another MCO. They share information on outlier thresholds in each plan's per diem arrangements with Middletown Hospital.
- At contract renegotiation time, Blue Plan insists on outlier terms that match what it has learned about the other plan's contract.

*Has the Blue Plan violated the antitrust laws?*

A. No, the Blue Plan didn't change its actual rates, only the outlier thresholds.

B. No, because there was no agreement by the other plan on any change in its contract.

C. Very possibly.

## Example 3: One for you, one for me

- Jerry the Broker tells the Blue Plan that his big customer, the Pencil Factory, is going to pick the competing Alpha Beta Plan for health coverage. He asks the Blue Plan to submit a high bid anyway, so he can show his client that the Alpha Beta plan bid is competitive. He promises to get a similar high bid from the Alpha Beta plan on the Blue Plan's school board account, to help the Blue Plan rates for that account look good.
- The Blue Plan decides to bid in the normal fashion on the Pencil Factory account, but it comes in higher than the Alpha Beta Plan.
- The Alpha Beta Plan bids on the school board account but it is not competitive with the Blue Plan.

*Has the Blue Plan violated the antitrust laws?*

A. No, because the Blue Plan didn't do anything wrong

B. What if you were the judge?



## Example 4: Rate and coding survey

- Al the Actuary thinks the Blue Plan needs to reduce provider costs. Al surveys other plans to get contracted per diems at the 4 major hospitals in the market, and to find out what medical services are included in certain bundled payment codes, and gives the results to Stu Savemore, the CFO.
- The Blue Plan takes a hard line at contract renegotiation time, insisting on lower rates from the hospitals, and modifies its coding software

*Has the Blue Plan violated the antitrust laws?*

A. No, since the Plan did not agree with the other plans on what anyone was going to do.

B. Very possibly.

## **Example 5: Hospital exclusivity demand**

**Largo Hospital is the dominant hospital in Healthy County. It threatens to cancel its contract with the Plan, or pull back on all rate reductions for hospital services, unless the Plan agrees to contract with the ASC the hospital is building and not with a new ASC being built by doctors in town.**

***If the Plan goes along, explaining that it is doing so only at the hospital's insistence, is there antitrust risk for the Plan?***

**A. Yes.**

**B. No.**

## Example 6: Customer request for specific contract terms

- Big customer puts out RFP asking for special terms – ability to do retro drops for up to 180 days without premium liability and second year of coverage with a rate increase cap of 7%.
- Helen from the Blue Plan talks to her friend Izzie from Interstate Insurance who says Interstate will reject the retro drop proposal and provide a cap of 10%. Helen says that sounds about right.
- The Blue Plan’s RFP response offers only a 90 day retro right for the customer, and proposes a 2<sup>nd</sup> year rate cap of 9.5%.

*Is there antitrust risk for the Blue Plan?*

A. Yes.

B. No.

## Example 7: Market Signaling

- Downtown Public Hospital announces its costs have increased and that it needs at least 30% rate increases from all managed care plans.
- The Blue Plan can't afford the increase, but also doesn't want to drop the hospital.
- The Plan issues a press release saying: "In the face of ever increasing costs, we cannot provide our customers with the health insurance value they deserve and absorb the price increase the hospital is demanding. So we may have to let the hospital go. Other insurers face the same cost pressures and we encourage them to ask themselves the same hard question we have asked ourselves."

***Did the Blue Plan violate the antitrust laws?***

A. No, it didn't agree with anyone else.

B. Very possibly.

## Avoiding Collusion

Avoid even the appearance of collusion. Here are some guidelines for external communications:

Don't:	Do:
<p>Discuss or share with competitors providers' rates under the plan's contracts or a competitor's contracts</p> <ul style="list-style-type: none"> <li>o That includes chats with personal friends</li> </ul>	<p>Make independent decisions, considering available information, including data providers may voluntarily give you or that is public</p>
<p>Make statements to third parties designed to "get the message" to competitors on need for restraint in provider rates</p>	<p>Exercise unilateral price restraint without comment; use competitive intelligence from customers or brokers to guide unilateral decisions</p>

## Avoiding Collusion

Don't:	Do:
Discuss or share with a competitor the plan's premiums or rate formula, or get such info from a competitor	Make independent decisions

## Avoiding Collusion (more)

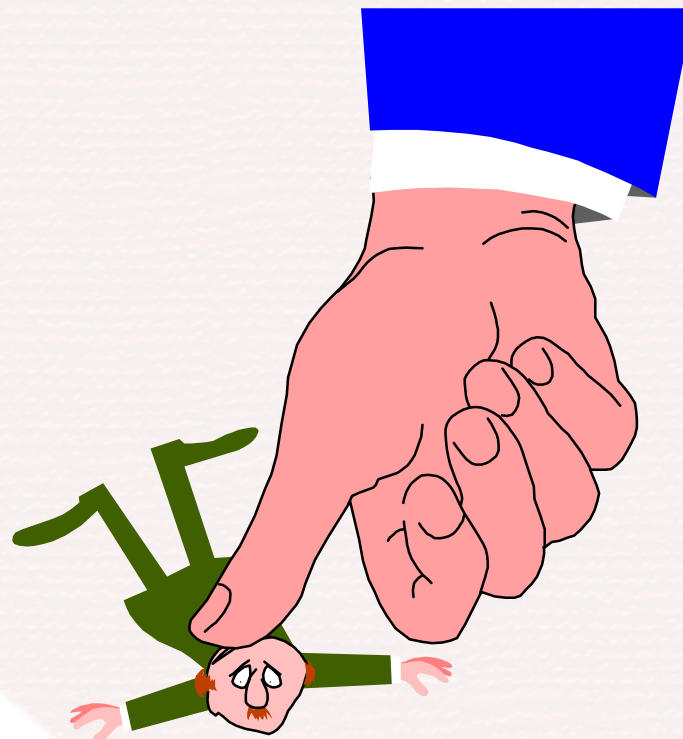
Don't:	Do:
Discuss or reveal to any competitor accounts to which the plan will or will not market	Make independent decisions
Don't discuss or reveal the plan's intentions for marketing outside its current service area	Maintain confidentiality of the plan's marketing or expansion plans

## Mergers: Don't Sink the Deal

- Acquisition will give our company “market dominance” in particular market segment
- “Merger Objectives” include:
  - “Create barriers to entry”
  - “Defend an expanding market share”
  - “Ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets”
  - “Put plans in place to command premiums for the services we provide”
  - “Improve pricing to achieve margin growth from 12.5% to 17%”
- Combined firm “will truly be the world leader”
- *FTC ALJ agreed – and found the merger unlawful*



# Monopolization



## Monopolization

- **Monopolization occurs when a company locks up control of a market through unfair or unreasonable exclusionary conduct. No conspiracy is required.**
- **Attempted monopolization is where anticompetitive conduct creates danger of monopoly**
- **Key distinction between monopolization and legitimate huge success is “how.” Being “big” or “having all the business” is *not* illegal. It is the conduct used to get there or stay there that is critical.**
- **Monopolization not normally a significant risk for most Blue plans given their market position, but perhaps not always the case.**

## Managing Documents

- Most antitrust cases are about “bad documents.” This is especially true about email. When writing notes, documents, or emails, plan personnel need to pay attention to the words or expressions you use.
- Documents are often required to be turned over when a company makes an acquisition; “bad” ones can spark needless antitrust problems

**PLAN PERSONNEL NEED TO BE AWARE OF EVERYTHING WRITTEN  
IN EMAIL OR OTHER DOCUMENTS!**

Some phrases, taken out of context, may be problematic:

- “The other plan ‘got the message’ when we declined to accept the hospital’s rates.”
- “We need to ‘hold the industry line’ and make sure there is discipline in the market on provider rate increases.”
- We will “control,” “dominate” or “own” that market.
- Our share of the “PPO market” is 65%.

## **Tips to Compliance with Antitrust Laws**

- 1. Don't send an email if a phone call will do.**
- 2. Focus on what business strategies will do "for" customers, not "to" customers or competitors.**
- 3. Recognize the constant need to remain competitive, avoiding exaggerations like "dominant" and "control."**
- 4. Avoid casual discussion of "markets" and "market share"; focus on customers or products instead.**
- 5. Do not discuss one customer's or provider's contract with a competitor.**
- 6. Do not create non-privileged documents regarding on-going litigation, government inquiries, or other legal disputes.**
- 7. Be especially careful at industry seminars and conferences. Walk out of meetings that seem to risk crossing the line.**
- 8. Don't just "recite" the antitrust compliance "pledge." Adhere to the substance.**

## **Tips to Compliance (cont'd)**

- 9. Think of emails and voicemails as documents; do not say things in jest that would embarrass you or the company if made public later.**
- 10. Do not retain drafts, either in hard copy or electronic form, unless necessary and in compliance with the plan's document retention policy.**
- 11. Review working files to prevent the build-up of unnecessary paper or electronic files.**
- 12. At least once a year, reduce the quantity of paper and electronic files that you maintain or for which you are responsible.**
- 13. However, do not discard documents or emails if they are relevant to a litigation or government investigation. Talk to the Law Department if you have questions about document retention.**
- 14. Avoid use of fee schedules, contracts or other confidential documents of competitors brought by new employees; if documents arrive, consult legal counsel**

## **What If Plan Suspects Others of Violating the Antitrust Laws?**

- **The antitrust laws apply to health care providers, MCOs, pharmaceutical manufacturers, and other vendors.**
- **Questionable activities by other parties may risk harm to Blue plans by raising prices in the short run or by making markets less competitive over time.**
- **Questionable activities by others can also pose antitrust risk for Blue plans. If a Blue plan enters into an illegal agreement, it could be liable to third parties even if it did not initiate the activity.**

## Coordination among Competitors

**Providers may try to coordinate contracting negotiations with Blue plans. For instance:**

- **A “messenger model” PPO insists that it is authorized to negotiate rates on behalf of its member providers.**
- **Plan receives similar termination letters from physicians in a single specialty raising the same “issues” for renegotiation.**
- **Competing providers inform plans at the time of termination that they have designated the same “agent” for purposes of negotiating rates.**
- **An IPA claims that it has the sole right to negotiate on behalf of its member providers making up 75% of a community’s physicians.**

## Coordination among Competitors (2)

- A local professional society pressures a plan for reimbursement changes through “position papers” or “surveys,” backed by implied boycott threats.
- Hospitals or doctors may seek to justify price fixing by vague claims they are “clinically integrated”.



## **Exercise of Market Power by Provider System**

- **A powerful provider system may try to use size, availability of specialty services or products, or location to gain advantage over competitors and to force contract concessions by a Blue plan through bundling, tie-ins or forced exclusivity.**
  - **All or none**
  - **Anti-tiering requirement for entire system**
- **This may be legal, but the provider system may be crossing an antitrust line, depending on the facts.**
- **DOJ investigation of one such system now ongoing.**

## **Exercise of Market Power by Dominant Health Plan Competitor**

**Across-the-board use of most favored customer clauses by a dominant health plan could raise antitrust issues – e.g., where a plan with 60% of the commercial health insurance business in its local market area requires all hospitals to promise it a 5% better rate than anyone else gets.**

## **Blue plan response to improper provider activities**

- **Potentially improper provider behavior should be brought to the attention of the Law Department.**
- **Education for providers involved may be appropriate.**
- **Plan may seek action by the appropriate antitrust enforcement agency or could even take action directly.**
- **Agreeing to contract with improperly constituted provider network out of convenience or accepting coercive contract terms without complaint may make later objection harder.**

# Plan Should Have Active Antitrust Compliance Program

- **Overall Policy**
- **Program**
- **Education**
- **Monitoring**

- ***Wrong!*** Price fixing can include agreement to reduce price competition, even if you don't change what you were going to do.

Try Again

- ***Wrong!*** *That's no excuse.*

Try Again

- *Right!*

Continue

- *Maybe so, but it doesn't look very good.*

Try Again



- **Wrong.** *Agreements can be inferred, even in the absence of an express or stated understanding.*

Try Again

- **Correct!**

Continue

- **Wrong.** *Agreements can be inferred, even in the absence of an express or stated understanding.*

Try Again

- *Right.*

Continue

- **Wrong.** *There could be risk, depending on facts, facts, facts . . .*

Try Again

- ***Wrong!*** It may have invited “agreement by action”

Try Again

- **Correct!** *If other plans let it be known they will also not contract, allegations of conspiracy could be supported.*

Continue

- *Appearances do matter*

Continue



- **Right.** *The agreement could be anticompetitive, and “unwilling” participants in an agreement can be liable for violations. Market impact could be very important.*

Continue

- ***Wrong.***

Try Again

- *Right.*

Continue

- *Right.*

Continue