Keeping Up Your Antitrust Guard

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Overview

- State and federal antitrust laws prohibit monopolistic conduct and agreements that unreasonably restrain trade
- Avoid improper agreements with competitors on price, customers, markets or other terms of dealing, and avoid contract terms with providers or customers that exclude competition
- Plans must know their rights under the antitrust laws.
- Limited exemption for “business of insurance” activities if “regulated” by the state, but not “boycotts” “coercion” or “intimidation”
- Protection also extends to petitioning/lobbying activity and to actions in furtherance of clearly articulated state purpose that are actively supervised by the state

Enforcement

- U.S. Government – Department of Justice Antitrust Division and the Federal Trade Commission
- State attorneys general
- Private plaintiffs
  -- Providers, consumers, customer groups, competitors
- State insurance departments have similar authority

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Risks of Non-Compliance

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

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Other Risk Factors

- Government enforcers may learn of violations from customers, providers and competitors, including firms trying to amnesty by self-reporting

- Consolidation in health plan field is sparking greater enforcement focus

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Larger Antitrust Penalties

Tough penalties for criminal antitrust violations:

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

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Compliance plan credit vs. amnesty

- Antitrust compliance plan yields no leniency under sentencing guidelines, in contrast to other areas of law
- Senior DOJ criminal antitrust enforcer notes that almost all criminal violators had compliance programs
- He describes their compliance plans as “two time losers” since they didn’t prevent violations and didn’t result in self-reporting.
- Instead, DOJ provides amnesty commitments to firms that come forward
- DOJ wants compliance, not compliance plans
- Ironically, this creates added emphasis on effectiveness of compliance plan

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Compliance Program Features

- Corporate Policy
- Program to maintain compliance
- Education – at executive, marketing and provider relations levels
- Monitoring

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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.

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Collusion

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Collusion

- Collusion is agreement, usually between competitors, that restrains competition. It can involve activity as sellers OR buyers.
- Mutual understanding to accomplish a common purpose.
- Does NOT require: (1) express, written, or formal agreements, (2) meetings in a "smoke filled room" or elsewhere, (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

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Inter-plan activity

- Blue plans cooperate in Blue initiatives, such as Blue Card program.
- Blue plans and their affiliates may also compete 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 outside that context

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Core misconduct

- **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**

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A little bit of knowledge . . .

- It's OK because it's in the minutes
- It's OK because it's not in the minutes
- Hmm. Everyone else is just sitting there, so I guess it's OK
- Let's all unilaterally set rates at . . . .
- Thanks for the antitrust presentation. Now, let's get back to business . . .

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Options if providers are acting unlawfully

- Employ education in attempt to dissuade improper activity
- Find work-around or counter-measure
- Complain to FTC, DOJ or state attorney general
  - Facts, facts, facts
  - Harm to public
  - Agencies will protect identity of complainant
- Bring own legal action

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Example 1: Checking on rates

- Harry the Hospital Guy tells Blue Plan Sally that the her rate proposal is not competitive, since other payors are paying more.
- Blue Plan Sue calls other local insurers to check and learns that Harry's telling the same thing to each payor. In fact, their rates with Harry are comparable and none has agreed to give more than a 5% increase for the coming year.
- Sue and her colleagues at the other plans are not bulldozed by Harry and do not increase their rate proposals.

Do Sally and the Blue Plan have antitrust vulnerability?

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

B. No, because Sally just checked on what Harry told her.

C. Very possibly.

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Example 2: One for you, one for me

- Bob the Broker tells the Blue Plan that the Big Bank, is going to pick the competing Alpha Beta Plan for health coverage. He asks the Blue Plan to submit a high bid, so he can show his client that the Alpha Beta plan bid is competitive and help justify his big commission. He promises to get a 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. Barney at the Blue Plan says he'll think about it.
- The Blue Plan decides to bid in the normal fashion on the Big Bank 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. Yes

Example 3: Provider network negotiation

Health plan negotiates fee schedule with network of providers. Network includes competing providers. Rates are higher than rates for other providers in area. Two years later, contract falls apart. Health plan sues provider network for price fixing, seeking damages.

Does health plan have claim for antitrust damages from provider network for difference between high contract rates and "market" rates?

A. Yes

B. No.

Example 4: Physician IPA Strategy

A network of competing physician groups agrees not to sign fee-for-service contracts with health plans, and insists, instead, on entering into risk-based "capitation" agreements that are actually more expensive to health plans than fee-for-service contracts at market rates would be.

Have physicians broken the antitrust laws?

A. No, so long as the physicians will be "integrated," through risk sharing

B. Antitrust risk significant if physicians can insist on above-market terms

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Example 5: State employee health plan program rates

- In budget crisis, State announces plan to refuse to accept any rate proposal for participation in state employee health benefit plan that increases rates by more than 3%.
- Health plan CEOs meet in state capital and discuss expressing concern to governor and key legislative leaders. Letter to Governor explains that rate increase cap ignores cost increases faced by plans.
- Blue plan issues press release warning that State risks withdrawal from bid process of all plans. Other plans make similar announcements.
- Legislature finds some more money, so cap is lifted.

Is there antitrust risk for the Blue Plan and other insurers?

A. Yes.

B No, since plans are protected in lobbying activity.

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Example 6: 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.

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Example 7: Setting Copayments

- A number of health insurers in State X are concerned there is too much variation in the level of copayments they use in products sold in the "individual" market.
- They meet, including a representative of the State X Insurance Department, and come up with four standard copay packages.
- Benefit plans in State X are subject to state filing and approval requirements.
- A consumer group complains that the plans have conspired to eliminate price competition regarding copayment levels.

Did the insurers violate the federal antitrust laws?

A. Yes

B. No

Avoiding Collusion

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

Don't:	Do:
Discuss or share with competitors providers' rates under the plan's contracts or a competitor's contracts o That includes chats with personal friends	Make independent decisions, considering available information, including data providers may voluntarily give you or that is public
Make statements to third parties designed to "get the message" to competitors on need for restraint in provider rates	Exercise unilateral price restraint without comment; use competitive intelligence from customers or brokers to guide unilateral decisions

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

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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*

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Example 7: Merger of dialysis companies

National dialysis companies merge, and claim that since industry is not concentrated nationwide, acquisition is not antitrust problem, even though shares are high in many local communities.

Is the merger analyzed using national, state or local market areas?

A. National

B. State

C. Local

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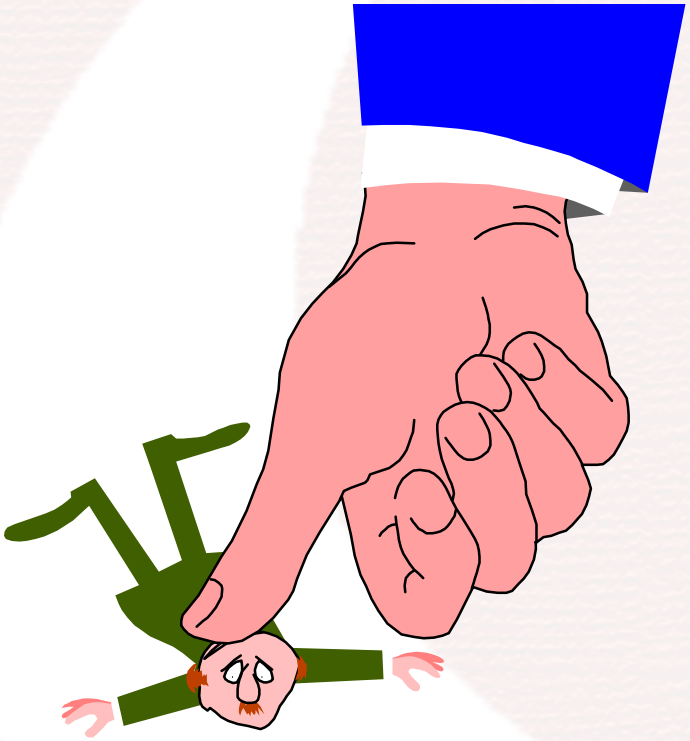
Monopolization



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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.

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Example 8: Hospital bundled pricing

- Hospital A has monopoly in neonatal care and invasive cardiovascular surgery. Hospital B competes with other hospital services.
- Hospital A offers "bundled" rates to managed care plans, covering all services. It also allegedly told insurers it would charge from 76 to 90 percent of its chargemaster, i.e. list price, if payor contracts with Hospital B.
- Hospital B's prices are lower, but plans won't contract with it.

Has Hospital A unlawfully sought to monopolize market?

A. Yes.

B. No, because Hospital A bundled set of prices are not below its costs.

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Example 9: Most favored customer clause by dominant Health Plan

Locally dominant health plan ensures its provider rates are 5% lower than other payors through most favored customer agreement with (1) almost all local providers or (2) with one hospital

Has health plan violated the antitrust laws?

A. Yes, in both situations (1) and (2)

B. Yes, in situation (1)

C. No, since plan is merely bargaining for lower price

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%.

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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.

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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

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

Try Again

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

Try Again

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- ***Right!***

Continue

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

Try Again

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

Try Again

- ***Correct!***

Continue

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

Try Again

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- ***Right.***

Continue

- ***Maybe not.*** *If the agreement was voluntary, and was not entered into via coercion or boycott threat,health plan damage claim might be barred. Arbitrators in Chicago rejected a claim by United HealthGroup on this ground*

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

- ***Maybe not, but appearances do matter***

Continue

- ***Not clear.*** *If the initial agreement was voluntary,and not product of coercion or boycott threat, health plan damage claim might be barred. Arbitrators in Chicago rejected a claim by United HealthGroup on this ground.*

Continue

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- ***Wrong.*** ***Lobbying protection does not extend to appearance of possible agreement to boycott State program***

Try Again

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- ***Right.***

Continue

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- ***Right.***

Continue

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- ***We're waiting to find out. Court of Appeals in 9th Circuit has asked for amicus briefs to help it decide what the rule should be.***

  – One possible answer: Illegal if:

  (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product;

  (2) the defendant is likely to recoup these short-term losses;

  (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.

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- *Could be wrong*. Insurers may have affirmative immunity defense under McCarran-Ferguson Act for activities in "business of insurance," that are "regulated by state law" and not boycott, coercion or intimidation.

  Note: Pending federal legislation would eliminate McCarran-Ferguson Act antitrust immunity for insurance business.

Try again

- *Could be correct*. Insurers may have affirmative immunity defense under McCarran-Ferguson Act for activities in "business of insurance," that are "regulated by state law" and not boycott, coercion or intimidation.

  Note: Pending federal legislation would eliminate McCarran-Ferguson Act antitrust immunity for insurance business.

Continue

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- *Wrong*. Risk-sharing can take physician activity outside of "per se" or automatic condemnation, but is not a blanket defense for anticompetitive conduct.

Try Again

- *Right*. FTC challenged physician leadership, 2 IPAs and 18 medical practices in Kansas City area who used this contracting strategy after health plan decided it wished to terminate existing risk contract. http://www.ftc.gov/opa/2006/08/newcentury.shtm

Continue

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Local

- FTC said markets are local for dialysis services, and required divestiture in scores of local market areas.
- Analysis is fact dependent

Continue

- *Wrong*
  - Absent special circumstances, an MFN clause with a single health care provider is not likely to harm competition, so situation 2 is probably not an antitrust problem

Continue

- *Wrong*
  - Where MFN has overall exclusionary effect on competition and entrenches market power, it could be actionable.

Continue

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- *Could be*

  DOJ and FTC have focused on potential anticompetitve character of MFN clauses, particularly on exclusionary impact

Continue