Introduction to Antitrust

American Health Lawyers Association Antitrust Boot Camp
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Basic Antitrust Statutes

- Section 1 Sherman Act, 15 U.S.C. §1
  - Agreements in restraint of trade
- Section 2 Sherman Act, 15 U.S.C. §2
  - Monopolization and attempted monopolization
- Section 7 Clayton Act, 15 U.S.C. §18
  - Anticompetitive mergers and acquisitions
- Section 5 FTC Act, 15 U.S.C. § 45
  - Unfair methods of competition
- State antitrust and unfair trade practice laws
- State unfair insurance trade practice laws

Who enforces?

- U.S. Government – Department of Justice Antitrust Division and the Federal Trade Commission
  - Have published detailed policy statements on antitrust enforcement policy in health care
  - Recent guidance regarding Accountable Care Organizations
  - Also issued numerous advisory opinions and business review letters
  - Explanations that accompany law enforcement actions
- State attorneys general
- Private plaintiffs
- State insurance departments have similar authority

Non-Compliance

1. **Employment sanctions**, including termination
2. **Criminal sanctions**, including up to ten years in prison and substantial fines
3. **Actions against organizations**, including investigations, class actions and other lengthy, expensive proceedings
4. **Large civil damage awards against the Company**, including treble damages and plaintiff's attorney fees
5. **Disclosure of the Company's 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 the Company's business relationships or contracts
8. **Injunctions**
9. **Merger delays and/or prohibitions**

Antitrust Penalties

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 treble 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
- Ever rising costs and consolidation in the industry is sparking greater enforcement interest

Background of Antitrust in Health Care

- *AMA v. United States*, 317 U.S. 519 (1943) – boycott of group health plan doctors in District of Columbia unlawful
- *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) – end of "learned professions" exception
- *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679 (1978) – agreement among competitors to restrain competition not justifiable on ground that competition itself will lower quality
- *Group Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 (1979) – agreements between health insurers and providers not part of McCarran-Ferguson Act "business of insurance" antitrust exception
- *AMA v. FTC*, 638 F.2d 443 (CA2 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) *(per curiam)* – ethical restraints on corporate practice and truthful advertising unlawful
- *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) – Physician network that jointly negotiates rates for participating physicians is per se illegal, absent indicia of integration to which price setting is ancillary
- *FTC v. Indiana Fed'n of Dentists*, 476 U. S. 447 (1986) – collective refusal to cooperate in utilization review unlawfully restrained competition
- *Patrick v. Burget*, 486 U.S. 94 (1988) – Anticompetitive abuse of hospital privileges process not protected by "state action" immunity

Agreements in restraint of trade

- Agreements in restraint of trade are unlawful
- Troublesome ones usually are “horizontal” -- between or among competitors.
  - Could involve activity as sellers or as buyers
- “Vertical” agreements are also subject to scrutiny – between buyer and seller.
- Agreement requires at least two parties with separate economic identities
  - Distinction between a corporation’s board of directors (still one “person”) and participants in a joint venture or other collaboration (professional association, IPA, ACO, hospital medical staff)
  - *Copperweld* doctrine confirms that parent and wholly owned subsidiaries, and sister corporations, are not capable of conspiring with each other
  - Outer edges of doctrine not clear where there are partially controlled non-profit corporations involved in collaborations or alliances
- Obvious examples of collusion include price fixing, boycotts, bid rigging, and dividing up customers or markets.
- Exclusive dealing and “most favored customer” clauses can also be improper, depending on the facts.

Agreements cont'd

- Must involve "restraint of trade"
  - Having anticompetitive desires not a restraint of trade
  - Mere advocacy or recommendations not enough
  - Must agree to DO something that affects conduct in the marketplace
- Reasonableness
  - Only agreements that unreasonably restrain trade are unlawful
  - Assessed in terms of competition
    - Impact on competitors is not itself the focus
    - Other policy considerations may bear on competition analysis, but are not the direct focus of legal test
    - More risk usually for "horizontal" agreements, between parties at same level of distribution, than for "vertical" agreements (buyer-seller)

Per se v. Rule of reason

- Some agreements are per se illegal
  - Price fixing, market and customer division, and certain group boycotts and tie-in arrangements
  - Attempts have been made to target hospitals for conspiracy to depress wages of nurses
- Most agreements are subject to “rule of reason” balancing test, that may involve complex analysis or could be resolved in a “twinkling of an eye”
  - Market power can be critical to rule of reason analysis
- Otherwise anticompetitive restraint might be permissible if ancillary to bona fide joint venture

Standard Jury Instruction on Collusion

- In order to prove that a conspiracy existed, the evidence must show:
  - The alleged members of the conspiracy
  - *In some way*
  - Came to an agreement or *mutual understanding*
  - To accomplish a *common purpose*

Standard Jury Instruction (cont.)

- However, the evidence need not show that:
  - Its members entered into any *express, formal, or written agreement*;
  - They *met together*; or
  - They *directly stated their purpose*, the *details of the plan*, *or the means* by which they would accomplish their purpose.
- The agreement itself may have been entirely unspoken.

Collusion and Associations

- Government investigations often focus on professional association, trade association, and medical staff meetings and related gatherings
- Preventative measures include:
  - Internal policies regarding participation and attendance
  - Compliance training and audits

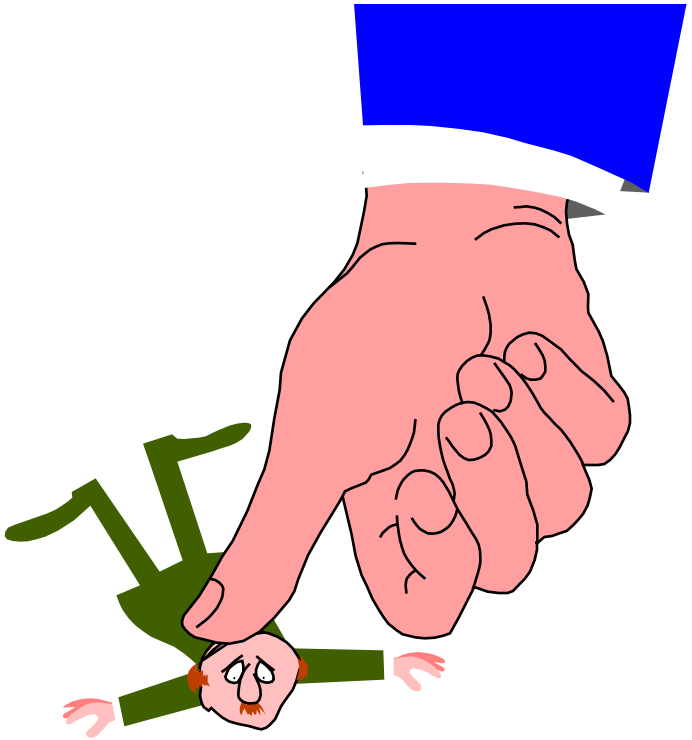
Managing Competitor Discussions

- In 1982, Robert Crandall (President and CEO for American) calls Howard Putnam (President and Chief Executive for Braniff) . . .
  - RC: I think it's dumb as hell for X's sake, all right, to sit here and pound the @#%#@!$ out of each other and neither one of us making a #@$#!@ dime.
  - HP: Well…
  - RC: I mean, you know, @$#@, what the hell is the point of it?
  - HP: But if you're going to overlay every route of American's on top of every route that Braniff has—I just can't sit here and allow you to bury us without giving our best effort.
  - RC: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.

Managing Competitor Discussions (cont.)

- HP: Do you have a suggestion for me?
- RC: Yes, I have a suggestion for you. Raise your @$@~!$ fares 20 percent. I'll raise mine the next morning.
- HP: Robert, we…
- RC: You'll make more money and I will too.
- HP: We can't talk about pricing!
- RC: Oh !#!@*!, Howard. We can talk about any @#!$! thing we want to talk about.

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 dangerous probability 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 elements

- Critical element #1: Market power (may be inferred from high market share)
- Critical element #2: Anticompetitive conduct (a/k/a “bad acts”)
  - Tying and (certain) bundling of multiple products/services
  - Refusing to deal with competitors in certain situations
  - Exclusive dealing or perhaps MFN provisions in certain situations
  - “Predatory” pricing (usually requires selling below variable or marginal cost)
- Other key issues:
  - Impact on competitors and consumers
  - Business rationale for conduct

Monopolization (cont.)

- Can reach unilateral conduct
- Defendant must have a competitive interest in the affected market
- Cases often turn on definitions of product and geographic market
- "Predatory pricing" cases very difficult
- Recent focus on bundled pricing as a possible tool for monopolization. *Cascade vs. Peace Health*, 515 F.3d 883
- Discount conditioned on exclusive dealing where price differential is coercive or predatory. *U.S. and Texas v. United Regional Health Care System* (2/25/2011) (complaint and proposed consent order)
- Attempt to monopolize requires specific intent and dangerous probability of success

Example: *Cascade Health v. PeaceHealth*

- Suit between the only two hospital service providers in Lane County, OR
- Cascade alleged that PeaceHealth, its larger rival, was attempting to extend its monopoly in tertiary care services to primary and secondary care services through the use of bundled discounts
- Despite offering lower cost primary and secondary services, Cascade claimed it could not compete with PeaceHealth's bundled prices
- The court found that defendant's bundled pricing policy was sufficient to exclude an equally efficient competitor – and therefore exclusionary – and ruled for the plaintiff

Mergers & Acquisitions

- Clayton Act bars anticompetitive acquisitions
- Impact assessed in specific product and geographic markets
- Market shares are a key diagnostic tool, but not definitive
- Barriers to entry among many factors that can affect outcome
- FTC and DOJ have published detailed merger guidelines

Merger track record

- FTC and DOJ had losing streak on hospital mergers for a long time
  - Some decisions appeared not to recognize dynamics of hospital competition for position in health plan provider networks
- FTC has had more success recently in hospital mergers
  - Cases in Ohio and Georgia now pending. In Toledo, hospitals are held separate pending ruling on injunction; in Georgia, district court finding of "state action" immunity is being reviewed by the Court of Appeals
- DOJ primary federal forum for investigation of health insurance mergers
  - More focus last few years as industry has seemed to become more concentrated and public attention has grown
- State attorneys general also active in merger enforcement
- State insurance departments use "insurance holding company act" powers to police anticompetitive mergers of health insurers

Hart-Scott-Rodino Act

- Acquisitions valued above statutory threshold (currently $66 million) require advance notification to FTC and DOJ under HSR Act
- Purpose:
  - To avoid the difficulty and expense of challenging anticompetitive mergers and acquisitions after they have occurred, and
  - To allow the agencies to preserve, as opposed to try to restore the state of competition

HSR Act (cont.)

- Parties must observe “waiting period” before closing
  - Agencies generally have 30 days to review transaction
  - At expiration of waiting period, agencies may seek additional information (“second request”)
  - If second request issued, parties may not close until 30 days after substantial compliance
- If agency ultimately has competitive concerns, can seek injunction
- Consent agreement is a possible outcome, where divestiture of some operations is sufficient to restore competition. Non-structural relief also possible, but less likely to be found sufficient by itself.

Example: UnitedHealth/Sierra Health

- In 2007, UnitedHealth Group announced its agreement to acquire Sierra Health Services
- Transaction combined the two largest managed care providers in the Las Vegas, NV metropolitan area
- DOJ alleged the combination would harm competition in the Medicare Advantage ("MA") business, potentially leading to higher prices and reductions in quality or breadth of benefits available to MA enrollees
- In order to remedy those concerns, UnitedHealth agreed to divest its own MA plans for individuals in Clark and Nye County, NV

Consummated Merger Challenges

- Agencies can also challenge consummated transactions, including those below the HSR thresholds as well as those that receive HSR clearance
  - Example: FTC's challenge to Carilion's 2008 acquisition of two outpatient clinics in Roanoke, VA
  - According to FTC, the acquisition – which was below the HSR threshold – reduced the number of competitors from three to two and was likely to result in increased prices
  - In settlement, Carilion agreed to divest both clinics

Robinson-Patman Act

- Robinson-Patman Act,15 U.S.C. § 13, bars certain discriminations in price in the sale of commodities of like grade and quality
  - Application only to "commodities" makes pharmaceutical sales and purchases its principal area of relevance in health arena
  - Complex and technical area of law, with potential defenses including "meeting competition," "functional discounts" and "cost justification"
- Sales to non-profit hospitals and charitable institutions "for their own use" are exempt. See *Abbott Labs. v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976).

Affirmative defenses/immunity

- "State action" doctrine where restraint implements a clearly articulated and affirmatively expressed state policy to displace competition, and restraint is actively supervised by the state (*Patrick v. Burget*, 486 U.S. 94 (1988) (defense inapplicable in suit challenging abuse of peer review process)
- Noerr-Pennington Act – protects petitioning government for action, except for sham activities where petitioning activity itself imposes harm to competition without regard to eventual outcome of government process.
- Health Care Quality Improvement Act – bars damages suits for peer review activities meeting specified standards. 42 U.S.C. §§ 11101 et seq.
- McCarran-Ferguson Act – exempts "business of insurance" where subject to state regulation and activity is not boycott, coercion or intimidation. 15 U.S.C. §§ 1011 - 1014

Key hot antitrust issues in health care delivery and insurance markets

- Mergers of hospitals, health insurers and other providers
- Joint provider negotiations with health plans
  - Is it price fixing?
  - Is it a reasonable adjunct to a pro-competitive "integrated" joint venture?
  - Latest focal point is "accountable care organizations"
    - HHS proposal that Medicare ACOs must be pre-screened for potential competition concerns; new proposed FTC and DOJ policy statement
- Joint ventures that may have overall anticompetitive effects
- Exclusive contracts, bundled pricing, coercive "discounts" conditioned on exclusivity, and Most Favored Nation clauses in managed care contracts
  - DOJ claims against *United Regional* – if dominant hospital's discount for exclusivity across all services is allocated to competitively contested cases in service lines that overlap with smaller hospital, net price for those services would be below cost. Exclusionary impact makes size of discount for exclusive contract predatory.
  - DOJ claim against Blue Cross Blue Shield of Michigan – dominant insurer's use of MFN clause dampens provider willingness to give competitive pricing to other payers