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A Primer: How Antitrust Law Affects Competition in the Health Care Marketplace

One important complement to the laws and regulations governing health care in the U.S. is ensuring that competition can work in the health care marketplace. Competition helps keep prices in check, and promotes consumer choice and product and service quality. In the health care context, competition means health care providers and medical product manufacturers work harder to win and keep the loyalty of consumers and other health care purchasers. Competition can also work alongside laws and regulations governing transparency, and safety and effectiveness of health care services and medical products, to give providers and manufacturers additional incentives to bring greater value to consumers.

At the same time, businesses are often tempted to avoid competing when they can. Avoiding competition can give some businesses greater influence and leverage over the marketplace—at the expense of consumers. Providers or manufacturers might agree among themselves to limit how they compete. Or they might take advantage of leverage they have in the marketplace to sabotage or interfere with the efforts of others to compete. There are concerns that health care marketplace competition has decreased in recent years. More health care systems are consolidating or affiliating with one another.

Greater consolidation can lead to lessened competition and potential higher costs and lower quality products and services in the health care system. There are strong concerns that recent hospital consolidation, lack of competition in pharmaceutical and medical device markets and consolidation of provider practices have led to higher costs for patients and health plans.

Some anti-competitive schemes can be challenged and stopped by using the antitrust laws. Other schemes may be beyond the reach of the antitrust laws, and need to be challenged and stopped through other means.

Since enactment of the Affordable Care Act, with the tandem focus on reducing health care costs and the promotion of policies to promote appropriate coordination and integration, effective antitrust enforcement it is all the more important.

SUMMARY

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What Is Prohibited by Antitrust Laws

The federal antitrust laws prohibit three categories of conduct that undermines competition:

- agreements by two or more businesses not to compete, or to limit competition;
- efforts by one or more companies to undercut competition by others in order to secure a monopoly; and
- mergers (or acquisitions of business assets) that would significantly reduce competition.

Each of these categories has specific requirements and limitations as the law has been interpreted by the courts.

Agreements Not to Compete

The first category—agreements not to compete, or to limit competition—is prohibited by section 1 of the Sherman Act. Some of these agreements—specifically, agreements to coordinate pricing, or agreements to divide territories or groups of customers—are prohibited "per se;" they are always prohibited, if proven. Per se violations can even result in criminal fines and imprisonment.

Other kinds of agreements are evaluated under the "rule of reason," and may or may not be prohibited, depending on how they actually affect competition. Proving a "rule of reason" case is generally more uncertain and expensive, as it requires a more detailed economic analysis of the effects. Many health care provider arrangements are evaluated under the rule of reason. For example, an agreement by a group of dentists to tell patients to withhold x-rays from insurance companies evaluating claims was ruled to be an unreasonable restraint of trade under the rule of reason.[1]

Undercutting Competition to Create or Keep Monopoly Power

The second category, referred to as monopolization or attempt to monopolize, is prohibited by section 2 of the Sherman Act. It does not require proving an agreement among competing businesses. One business can commit this kind of violation on its own. But it does require proving either that the business already has what amounts to a monopoly, or that the attempt to get a monopoly has "a dangerous probability of success." And it is also not enough that the business has a monopoly; there must also be proof of conduct to unjustly secure or keep the monopoly by sabotaging the efforts of other companies to compete. In the health care arena, the U.S. Department of Justice brought a case against a hospital for using exclusive contracts with health insurers to exclude competing hospitals from being able to participate in the local area, thereby monopolizing hospital services in the area. The case was settled when the hospital agreed to stop entering into the exclusive contracts and to cancel the ones it had entered into.[2]

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Mergers that Significantly Reduce Competition

The third category, merger that would harm competition, is prohibited by section 7 of the Clayton Act. Unlike the other two kinds of violations, anticompetitive mergers can be stopped before they take place, so before harm to competition and consumers results. The law requires proof that the merger would "substantially lessen competition," so the fact that there will be one fewer business competing after the merger is not sufficient grounds to prohibit *unless* the competition being eliminated is significant enough. Sometimes the only solution to an anticompetitive merger is to block it entirely; but other times the aspect of the merger that harms competition can be separated out, and taken care of by selling off, or "divesting," that part of the business to another independent business, so that the competition it has been providing can be preserved. A merger between an integrated health care system and the area's largest primary care physician group, which resulted in the combined system having more than 75% of all primary care physicians in the area was ruled to violate section 7 of the Clayton Act because, among other problems, it gave the combined system too much power to force increased reimbursement rates on insurers, pushing up the cost of health care and health insurance.[3]

Who Can Bring Legal Action

There are limits on who can bring court action under the antitrust laws. Generally speaking, only those who deal directly with the businesses engaging in the anticompetitive conduct or merging can bring legal action. That often means that consumers are considered too far removed, or "indirect." And that is even more true for consumer advocates who do not suffer personal harm, but are concerned for the welfare of others. Often, the only practical alternative is to bring concerns to the attention of government officials for investigation and enforcement.

The federal antitrust laws can be enforced at the federal government level, by the Department of Justice and the Federal Trade Commission,[4] and also at the state government level, by the state's attorney general. Most states also have their own state versions of antitrust law, enforced by the state attorney general. It often makes sense to contact both state and federal enforcers. The federal government has more resources, but the state government may be better able to prioritize its efforts on a violation that has impacts only inside the state.

What to Look For

It is not always easy to tell whether an antitrust violation is taking place. It is not obvious, for example, when several competing sellers are all charging essentially the same price, if they are cooperating improperly with each other to keep prices high; or if they are competing properly with each other, and each seller is taking prices as low as it can, to attract customers away from its competitors while still being able to stay in business. Either way, the competing companies may be keeping an eye on each other's pricing, which is allowed. What they are not allowed to do is *cooperate* with each other on pricing, even in subtle ways.

What advocates should be looking for is something that seems off, something that suggests that a service provider or product seller isn't trying to compete for business. A trained antitrust investigator or private antitrust lawyer will be able to dig further into the facts to see what might be going on. If there is a change in a company's behavior that can't be easily explained, some new inflexibility, some reduction in the range of options offered to consumers, that's the kind of indicator that an antitrust investigator will be interested in.

For mergers, it's not enough that there will be one less company in the market—that happens with every merger. What matters is how important is the company that's being eliminated, whether that means a significant reduction in meaningful choice. Figuring that out usually requires the antitrust investigator to undertake a thorough examination of buyers and sellers who are doing or have recently done business in the marketplace. But how the merger might actually affect individual consumers' choices can be an important perspective that contributes to that thorough examination—or that helps show why a thorough examination is justified.

When Legislative and Regulatory Advocacy are Needed to Promote Competition

Finally, there are two kinds of situations in which the antitrust laws don't apply even though the businesses are clearly trying to block or reduce competition, even to fix prices. The first kind of situation is when the state government has instituted a clear policy that it doesn't want there to be competition for some kind of product or service, and it backs up that policy with active government supervision of the conduct or service.

These restrictions are considered to be "state action," not privately directed conduct, and thus beyond the reach of the antitrust laws, despite how much they may harm competition. For example, a state law might set prices for something, or might direct which sellers or providers can operate in particular parts of the state or which can serve particular kinds of buyers. Or it might dictate that only sellers meeting certain qualifications can sell a product or provide a service—such as a requirement that nurse midwives cannot deliver babies unless a state-accredited physician is present.

The second kind of situation is when the businesses are seeking to change the law by advocating before the state legislature or the state regulatory body. The courts have deemed that kind of advocacy to be protected by the first amendment as freedom of speech, as long as the advocacy is not a "sham" to hide some actual anticompetitive conduct. For example, an association of physicians might work together for a new law that requires a physician to be present when a nurse midwife is delivering a baby, or that requires that a physician delivering a baby be a certified obstetrician, or that limits a physician to delivering babies within 10 miles of where the physician lives.

These kinds of restrictions on competition cannot be challenged in the courts, as long as the conditions are satisfied—for state action, proof of clear policy and active supervision, and for advocacy, no proof of sham. These kinds of restrictions can only be challenged in the state legislature or regulatory body setting the policy. Sometimes the state and federal antitrust enforcement agencies will undertake this kind of advocacy, so it makes sense to bring these kinds of concerns to their attention as well.

Notes

1. FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).
2. U.S. v. United Regional Healthcare System, No. 7:11-cv-00030 (N.D. Tex. 2011).
3. FTC v. St. Luke's Health System, Ltd, No. 14-35173 (9th Cir. 2015).
4. The U.S. Department of Justice and the Federal Trade Commission share full authority to enforce the antitrust laws. They decide between themselves who should handle any particular matter that comes to their attention, based on who is more familiar with the market involved. Both agencies have been involved in antitrust enforcement in various health care market sectors. Criminal violations are handled by the Department of Justice.

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