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Healthcare Antitrust Challenges: Management Agreements, Joint Ventures and Ancillary Restraints

Complying with Antitrust Laws in the Ordinary Activities of Healthcare Organizations

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www.mwe.com

Introduction

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- Antitrust challenges to provider mergers, as well as the antitrust implications of accountable care organizations, have been well profiled
- There are many other potential antitrust implications of provider conduct in today's post-ACA marketplace
- Today's seminar will cover examples of ordinary course provider conduct that could give rise to potential antitrust concerns, with the goal to identify any potential issues early on and, where appropriate, implement risk minimization strategies and antitrust compliance procedures

General Antitrust Rules

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- Independent, competing providers may not enter into unlawful agreements
- Unless they are under common ownership and control
- And they cannot use a third party to facilitate an unlawful agreement among them
- The types of collaborations we will discuss typically do not involve providers coming under common ownership and control for everything they do, so these rules apply

Unlawful Agreements

- Unlawful agreements include, e.g. certain:
  - Price-fixing agreements
  - Market allocations
  - Group boycotts

Management Agreements

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- Antitrust implications when:
  - A competitor manages another competitor
  - An entity provides management services to competing providers
- Basic prohibition:
  - Unless the management company owns and controls, or is under common ownership and control with, all competing providers that it manages,
  - The management company and the managed providers may not unlawfully coordinate their conduct

Management Agreements

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- This means the manager may not on behalf of all managed, competing providers:
  - Jointly negotiate with payors the reimbursement rates that the payors will provide to the managed facilities
  - Establish a common fee schedule for the services that the providers render
  - Set a common wage scheme for the personnel employed by the providers

Management Agreements

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- This covers a lot of the management services that a manager provides – what can they do with respect to the management of competing facilities?
  - Make separate recommendations to each facility based on public or third-party data and the unique circumstances of that facility, regarding reimbursement or wage ranges, with each separate facility making its own, independent decisions on these matters
  - Establish separate teams at each facility, and implement a firewall between each management team
  - Negotiate managed care rates on behalf of competing providers if – and only to the extent that – those providers are participating in a program of substantial financial risk sharing or clinical integration

Management Agreements

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- Since the exchange of competitively-sensitive information, followed by parallel or coordinated conduct, could give rise to an unlawful agreement under the antitrust laws, competing facilities under common management should not exchange, and the manager should not facilitate the exchange among the competing facilities of, competitively-sensitive information, including:
  - The prices that the providers charge for services
  - Reimbursement terms of payor contracts
  - Wage and cost information
  - Non-public strategic plans and initiatives

Management Agreements

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- To safeguard against inappropriate information sharing, the manager should implement a firewall
- Effective elements of a firewall include:
  - Separate personnel providing services to different managed entities
  - Physical, technical and administrative safeguards to protect unauthorized access to and disclosure of competitively-sensitive information

Joint Ventures

- Antitrust implications when the joint venture covers some, but not all, of the parties' operations/businesses and:
  - The joint venture partners compete with the joint venture; or
  - The joint venture partners compete with each other outside of the joint venture
- Basic prohibition:
  - Unless a joint venture partner has unilateral control over a joint venture, the joint venture and the joint venture partner are competitors to the extent that they provide the same services in the same geographic regions (and if not, are at least potential competitors), and may not unlawfully coordinate their conduct
  - To the extent that joint venture partners are competitors for services they separately provide outside the joint venture, they will remain such notwithstanding their being joint venture partners for services rendered by the joint venture

Joint Ventures

- For example, a hospital and a physician practice form a joint venture to operate an ambulatory surgery center (“ASC”)
  - The hospital employs physicians that provide services in competition with the physician practice’s professional services
  - The hospital will continue to provide outpatient services that will be in competition with the ASC

Joint Ventures

- This means that *the joint venture partners together* may not:
  - Jointly negotiate with payors the reimbursement rates that the payors will provide to the joint venture partners for services rendered outside of the joint venture
  - Establish a common fee schedule for the services that the joint venture partners render outside of the joint venture
  - Set a common wage scheme for the personnel employed by the joint venture partners outside of the joint venture

Joint Ventures

- This also means that *a joint venture partner*, unless it has unilateral control over the joint venture, may not:
  - Jointly negotiate with payors the reimbursement rates that the payors will provide to the joint venture partner and the joint venture
  - Establish a common fee schedule for the services that the joint venture partner and joint venture render
  - Set a common wage scheme for the personnel employed by the joint venture partner and the joint venture

Joint Ventures

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- Within the context of the joint venture, the joint venture may:
  - Negotiate with third-party payors for the reimbursement the payors will provide the joint venture for services rendered
  - Establish a common wage methodology and salary and benefit plan
  - Otherwise operate as a unified business

Joint Venture

- Antitrust Compliance
  - Antitrust protocols and firewalls recommended to prevent the exchange of competitively-sensitive information among joint venture partners and the joint venture, to the extent that they are competitors
  - Consider Clayton 8 prohibitions on interlocking directors and officers
    - Applies only to boards of competing organizations
    - The organizations must be engaged in material competition

Exclusivity Agreements

- Subject to the rule of reason
- Usually procompetitive
  - Promote efficiency, quality, maybe lower prices
- Anticompetitive issue: whether rivals foreclosed from access to a customer, supplier or input they need to compete
  - Risk must apply to the *competitive process*: antitrust laws protect competition, not any individual competitor
- FTC/DOJ typically OK but will oppose if facts show harm
- Excluded competitors may threaten litigation

Exclusivity Agreements

- Can take many forms in healthcare markets
  - Health Plan has exclusive right to Provider for network contracting
  - Provider has exclusive right (in its specialty) to Health Plan's network
  - Provider A (physician specialty group) has exclusive right to provide services at Provider B (hospital)
  - Provider B (hospital) has exclusive access to Provider A (phys. group)
  - Health Plan rents network exclusively to TPA
  - Members of Clinically Integrated Network contract only through CIN (not individually or through other networks)
- Exclusivity can go one way or be mutual

Exclusivity Agreements

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- Antitrust analysis: weigh foreclosure against benefits (quality, efficiency)
- Example: Hospital and Physician Group have mutually exclusive contract
  - Can PG's rivals be effective competitors without access to Hospital?
  - Can Hospital's rivals be effective competitors without access to PG?
  - Ask: Will agreement enable anticompetitive pricing in either market?
- Sub-50% market share held by exclusive party is likely a safe harbor
- Other factors that can minimize antitrust risk
  - Contract duration of 2-3 years or less
  - Ease of termination, e.g., upon reasonable notice (~ 6 mos.) without cause
- *IDEXX Labs* (FTC 2013) – producer with 70% share had exclusives with distributors that combined for 85% of sales to customers (veterinarians)

Covenants Not to Compete

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- The label sounds anticompetitive but the purpose and effect can be (and usually are) efficiency enhancing
- Subject to rule of reason if reasonably ancillary to an otherwise procompetitive arrangement
- "Naked" covenants not to compete – i.e., not ancillary to a broader, lawful agreement – are illegal *per se* if horizontal
- Common rationale: Covenant by seller protects the value of goodwill tied to the asset that buyer purchases from seller
  - Geographic and product/service dimension are relevant to analysis

Covenants Not to Compete

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- Common covenants in healthcare markets
  - Restrict physician’s right to practice in local area upon departure from practice group or employer
    - Protects employer investments in physician training, quality initiatives, practice group marketing, reputation-building
  - Bar seller from market re-entry after its sale of a business (such as a health insurance product or an outpatient facility)
    - Protects deal value, which would be undermined if seller used its brand and goodwill to re-enter and compete against the asset it sold to buyer
- By protecting these investments, covenants encourage *making* such procompetitive investments in the first place

Covenants Not to Compete

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- Must be reasonable in length and geographic scope
  - Reasonableness depends on the circumstances
  - More than 2 years for physician non-competes may be questionable
  - A longer non-compete is usually OK in markets with longer entry times
  - Geographic scope should be tailored to where the assets competed
- Covenants *by buyers* not to compete are highly suspect
  - Usually no procompetitive justification; not reasonably ancillary
  - Seller may not shield itself from competition by using sale of asset as quid pro quo for promise by buyer not to enter a different market

Covenants Not to Compete

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- Reasonable or lacking a procompetitive justification?
  - Hospital acquires physician group; parties agree that a physician who leaves may not practice within local defined territory for 2 years
  - Orthopedic group purchases local MRI assets from multi-region MRI provider, which agrees not open new MRI capacity in local area for 3 years
  - Health plan sells Medicaid Advantage business in State X to buyer; parties agree buyer will not launch PPO product in State Y for 2 years
  - Competing oncologists in City create joint venture to open cancer screening clinic in nearby Suburb; parties agree not to open physician office in Suburb for 3 years

Due Diligence

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- Always appropriate in transactional setting; rule of reason applies
- Key antitrust compliance questions:
  - Are you negotiating with a competitor?
  - If yes, is the competitor's information reasonably necessary to see?
  - If yes, is it competitively sensitive?
  - If yes, must you see it now, or can it wait until a deal is more imminent?
  - If now, must it be viewed as is, or can it be redacted or aggregated?
  - If as is, is reviewer unlikely to use it given his/her ordinary job function?
  - Is everyone on due diligence team aware of their antitrust restrictions?
- Always consult legal counsel to ensure antitrust compliance

Due Diligence

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- Competitively sensitive information to which access should be restricted per advice of counsel
  - Current and future prices (those charged to payors & paid to suppliers)
  - Identity of current and proposed customers and suppliers
  - Cost information that is non-public and not aggregated
  - Key negotiated contract terms
  - Detailed salary and benefit data
  - Strategic plans, new market initiatives
  - Any information you would not want rival to see if deal collapses
- Same general rules apply to all competitor information exchanges

Wage Surveys & Salary Benchmarking

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- Antitrust laws apply not only to sale of services by healthcare providers, but also *purchase* of labor and expertise
- Thus, healthcare providers can also violate antitrust laws by agreeing with competitors regarding employment matters
  - "No poach" agreements - (e.g., allegations against tech companies about agreement banning recruiting of each other's employees)
  - Explicit agreements about salaries and wages paid to employees
  - Information exchanges about salaries and wages

Wage Surveys & Salary Benchmarking

- Potential areas of concern for in-house counsel
  - HR department may not be aware that direct contacts with competing employers can raise antitrust issues
  - HR department may not be aware that DOJ and FTC have issued guidance on how to properly conduct wage surveys and salary benchmarking
  - Potentially large liability due to large classes of facially similar employees (e.g., RNs, technicians)
  - Employing physicians an increasing trend and another potential area of vulnerability

Wage Surveys & Salary Benchmarking

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- Risks of wage surveys and salary benchmarking gone wrong include:
  - Private lawsuits
    - Nurse wage fixing class actions
  - Government investigations
    - Utah Nurses
    - AzHHA
  - Criminal prosecution

Wage Surveys & Salary Benchmarking

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- When do wage surveys and salary benchmarking cross the line?
- When they allow competitors to collude on the compensation they pay employees
- If competing employers collude, they can potentially adversely affect the availability of employees

Wage Surveys & Salary Benchmarking

McDermott Will & Emery

- But, antitrust laws do recognize pro-competitive benefits of wage surveys and salary benchmarking
- Allow companies to identify what is the market rate
- Lets companies make competitive offers

Wage Surveys & Salary Benchmarking

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- DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care Antitrust "Safety Zone"
  - Survey managed by third party
  - Information provided to survey is more than 3 mos. old
  - At least 5 providers report data for each statistic surveyed, no single provider's data represents more than 25% of the response for a statistic, and information aggregated so recipients cannot identify compensation paid by a particular provider
- Other Dos and Don'ts
  - No direct communications with competitors
  - Watch your words

Joint Purchasing Arrangements

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- Joint purchasing arrangements are a form of joint venture or competitor collaboration that is most often pro-competitive, because it reduces healthcare providers' costs and increases efficiency
- But, can raise antitrust concerns if result in:
  - Too much purchasing power ("monopsony power") or
  - Facilitate collusion among participants in services or products sold

Joint Purchasing Arrangements

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- Joint purchasing arrangements are analyzed on a case-by-case, fact specific basis and normally pass antitrust muster
- But, joint purchasing arrangement cannot be an agreement that simply fixes prices participants willing to pay
- Legitimate joint purchasing arrangements **<u>must</u>** combine some integration of purchasing functions to achieve efficiencies

Joint Purchasing Arrangements

- Monopsony power concern arises if joint purchasing arrangement means participants can force supplier to accept prices below the competitive level
- Also, is there some integration of purchasing functions to achieve efficiencies (e.g., labor, warehousing, lower inventory costs, delivery)?

Joint Purchasing Arrangements

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- Aside from monopsony, other main concern is "spillover collusion"
- Joint purchasing arrangements and broader regional collaborative networks aimed at reducing costs or sharing best practices gaining in popularity, but participants must be careful not to allow collaboration with competitors to "spill over" to areas not covered by collaboration
  - information sharing,
  - price-fixing, or
  - market or service allocation
- Participants in joint purchasing arrangements must also take care when denying membership to a prospective member so it is not an unlawful group boycott

Joint Purchasing Arrangements

- DOJ and FTC have issued guidance to industry on joint purchasing arrangements, including an “antitrust safety zone”
- The joint purchasing arrangement must meet two requirements to fall within the safety zone:
  - the purchases must “account for less than 35 percent of the total sales of the purchased product or service in the relevant market”; and
  - the cost of the products and services purchased jointly must account “for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.”

QUESTIONS?

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