Health Care and Antitrust

AHLA
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Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Overview

- Antitrust law in five minutes
- Does antitrust matter in health care? Should it?
- Specific issues
- Defenses
- Enforcement

Antitrust law in five minutes

- Three areas
  - Joint conduct
  - Unilateral conduct
  - Mergers

Antitrust law in five minutes

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  - Joint conduct
  - Unilateral conduct
  - Mergers
- And a fourth
  - Price discrimination

Joint conduct

- Section 1 of the Sherman Act
- Every contract, combination or conspiracy in restraint of trade is unlawful

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- Every contract, combination or conspiracy in restraint of trade is unlawful
- Two elements
  - Agreement
  - Harm to competition

Joint conduct

- Agreement
  - Express, implied
  - Written, oral
  - Circumstantial evidence

Joint conduct

- Agreement
  - Express, implied
  - Written, oral
  - Circumstantial evidence
- Powerful tool on summary judgment
  - Conduct as consistent with unilateral behavior as with conspiracy does not suffice
  - *Twombly*

Joint conduct

- Harm to competition
  - Competition, not competitors

Joint conduct

- Harm to competition
  - Competition, not competitors
- Define a relevant market
  - Key concept: substitutability
  - Product or service
  - Geography

Joint conduct

- Alternatively: presume harm
  - Agreements among competitors
    - Price fixing
    - Division of customers
    - Market allocation

Joint conduct

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  - Agreements among competitors
    - Price fixing
    - Division of customers
    - Market allocation
- Approaches
  - Rule of reason
  - Per se
  - Quick look, burden shifting

Unilateral conduct

- Section 2 of the Sherman Act
- Prohibits:
  - Attempts to monopolize
  - Actual monopolization

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- Elements:
  - Monopoly power
  - Anticompetitive conduct

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- Anticompetitive conduct
  - Exclusionary
  - Examples:
    - Predatory pricing
    - Raising barriers to competitors (Michigan BCBS)

Unilateral conduct

- Monopoly power
  - Relevant market
- Anticompetitive conduct
  - Exclusionary
  - Examples:
    - Predatory pricing
    - Raising barriers to competitors (Michigan BCBS)
- Possession of monopoly power is not unlawful

Mergers

- Section 7 of the Clayton Act
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Mergers

- Section 7 of the Clayton Act
- Prohibits mergers or acquisitions that may substantially lessen competition
- Prophylactic; seek to enjoin merger
  - On occasion: after the fact
  - Evanston Northwest

Mergers

- Define a market
  - Always?
- Show harm likely
- Efficiencies

Antitrust law in five minutes

- Three areas
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  - Mergers
- **And a fourth**
  - **Price discrimination**

Price discrimination

- Robinson-Patman Act
- But: goods only, not services
- Only significant area in health care
  - Purchases of pharmaceuticals
  - Other goods

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Is health care different?

- Payer and consumer are not the same
- Half or more of hospital revenue from Medicare and Medicaid
- Cost shift

Is health care different?

- Mission-driven hospitals
  - Not-for-profit, tax exempt
  - Charity care
- EMTALA
- CON statutes
  - FTC and DOJ have criticized CON programs

Is health care different?

- "The most expensive piece of medical equipment is the doctor's pen."
- "The primary cause of McAllen's extreme costs was, very simply, the across-the-board overuse of medicine."

Atul Gawande, "The Cost Conundrum," *The New Yorker* (June 1, 2009)

Is health care different?

"Market forces may work well to do many things, but creating a sustainable, affordable health care system does not appear to be one of them."

"Why Market Competition Will Not Mend Our Health Care System," Managed Care Magazine (Feb. 2007)

Scanlon, et al., "Does Competition Improve Quality?" (2008) (finding no correlation between competition and quality)

Is health care different?

- Application of antitrust to health care
- Settled 30 years ago
- A live debate today

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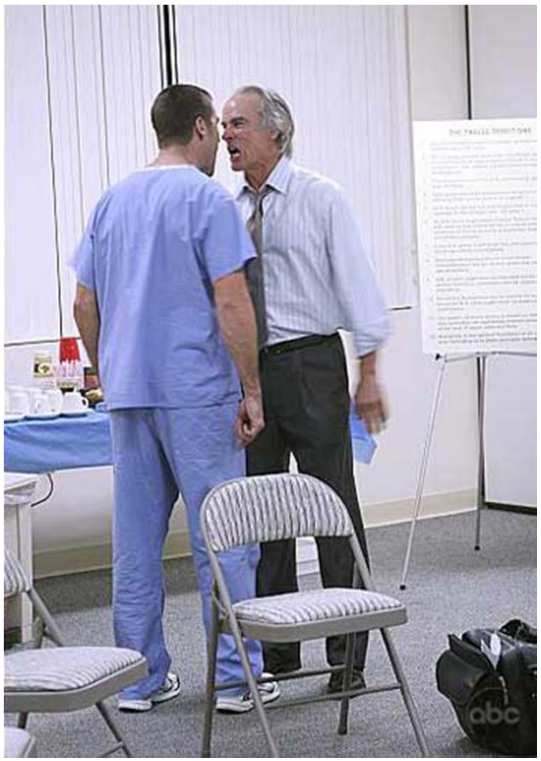
Specific issues in health care

- Staffing and privileges
- Exclusive contracts
- Joint negotiations with payors
- Information sharing
- Single entity?
- Packaged pricing: bundles and tying

Staffing and privileges

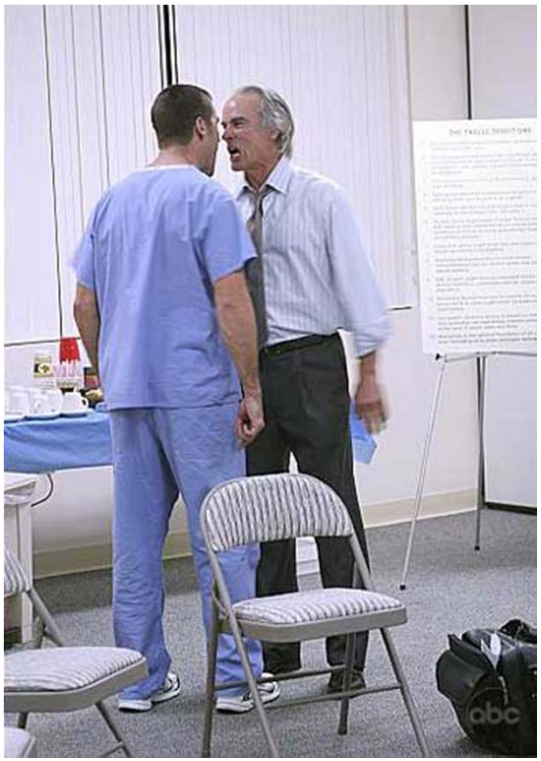
- Credentialing, peer review
- Section 1
- Agreement?
  - Medical staff and board
    - Two entities?
    - Conspiracy?
  - Recommendation



Staffing and privileges

Defendants usually win

- Lack of joint action
- No harm to competition
- State action
- HCQIA



Exclusive contracting

- Common in health care
- Focus: market, not doctor
- "[T]housands of pages of federal reporters … [have] almost always come to the same conclusion: A staffing decision at a single hospital based on exclusive contracts is not violative of the antitrust laws."

BCB Anesthesia Care Ltd. v. Passavant Mem'l Hosp. Ass'n, 36 F.3d 664, 667 (7th Cir. 1994)

Joint negotiations

- Provider networks
  - IPA
  - PHO
  - ACO?
- Single entity for antitrust purposes?
  - Integrated
    - Financial integration
    - Clinical integration
- If not integrated: messenger model

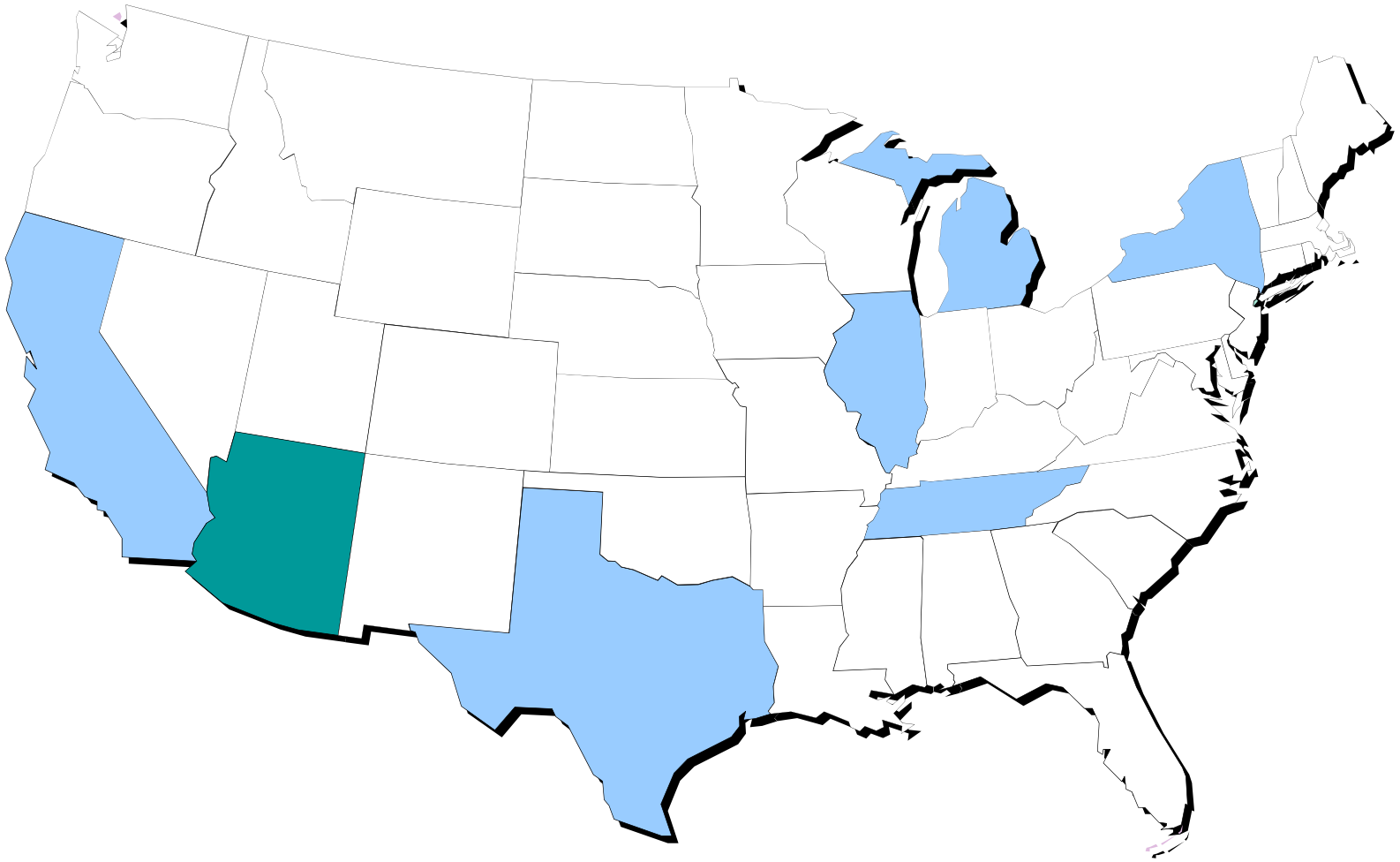
Joint negotiations

- Government enforcement
  - Broken messenger models
- Many consent decrees
- One litigated case
  - NTSP

Exchanges of information

- Exchanges of wage information
- Agreement? Harm to competition?
  - Per se or rule of reason?
- Nurse salary lawsuits
  - Two theories
    - Actual price fix
    - Exchange of information

Nurse wage cases



Recurring Issues: Information Sharing

- Statements 5 and 6 have very specific guidelines for when and how competitors may share wage a price information: generally, it has to be blind, comprised of no more than 25% from a single source, and historical (not current or prospective)

Single entity?

- Do we have a single entity?
- *Copperweld*
  - Parent and wholly owned subsidiary
  - Control
- Health care joint ventures
  - ASC, outpatient imaging
  - 90/10? 50/50?
  - Board composition, other elements

Recurring Issues: Bundling and Tying

- *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)
- Enough said

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Antitrust Defenses Relevant to Health Care Entities

- The Health Care Quality Improvement Act ("HCQIA") of 1986
- State Action Doctrine
- Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36
- Non-profit Institutions Act, 15 U.S.C. § 13c

Defenses: HCQIA

- Shields health care entities from monetary damages under antitrust laws (as well as other laws) for peer review activities
- Requirements – action taken:
  - (1) in the reasonable belief that it would further the quality of health care;
  - (2) after a reasonable effort to obtain the facts;
  - (3) with fair procedural safeguards; and
  - (4) in the reasonable belief that any disciplinary action is based on the facts.

Defenses: State Action Doctrine

- Applicable to public hospital districts
- Also applicable to members of peer review committees at public hospitals.
- Doctrine
  - Clearly articulated and affirmatively expressed policy to displace competition
  - Active state supervision

Defenses: Non-profit Institutions Act

- Purchases by nonprofits for their own use are exempt
- FTC guidance

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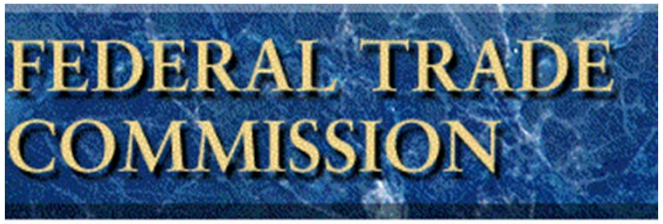
Enforcement

- Government
- Private parties

Enforcement: government

- Federal agencies
  - Department of Justice ATD
  - Federal Trade Commission
- Relief
  - Criminal (ATD)
  - Civil
  - Injunctive



Agency Safety Zones

- U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996)

Enforcement: government

- Attorneys General
  - Civil
  - Some criminal

Enforcement: private

- Who can sue?
  - Persons injured by reason of anything forbidden by the antitrust laws
- Relief
  - Treble damages
  - Fees and costs
  - Injunctive relief

Health care reform

- ACOs
- FTC guidance

Health care reform

What do we know already?

- Statements 8 and 9
- Financial integration
- Clinical integration
  - Real evidence of integration
  - Necessity of price negotiation
  - Higher prices – OK?
  - No market power

Questions

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