Antitrust Developments in Health Care: 2009

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Overview

- Government enforcement
- Private litigation
Overview

- Government enforcement
  - Changes at the top
  - Enforcement actions
  - Agency advice: clinical integration
Government enforcement: DOJ

- DOJ 2008:
  - Section 2 report
- DOJ 2009:
  - Withdraws report
Government enforcement: FTC

- Jon Leibowitz
- Rich Feinstein
Government enforcement: FTC activity

- Carilion Clinic
  - Acquisition of ASC, Imaging Center
  - 3-2
  - Prices
  - CON opposition
Government enforcement: FTC activity

- IPAs
  - San Francisco
  - Modesto, CA
  - Boulder, CO
- Capitation vs. fee-for-service
- Broken messenger models
Government enforcement: FTC activity

- NTSP: the end of the line
- Supreme Court denied cert
Government enforcement: FTC

- Clinical integration
  - 1996 Statements
  - SHO (2006)
  - GRIPA (2007)
TriState Health Partners
- 200 physician PHO
- Clinical practice guidelines
- Financial contributions; time and effort
- Require referrals within network
- Monitor performance
- Web-based HIT; EMR

Non-exclusive
Government enforcement: FTC

- Competition advocacy
- Minnesota: bill to exempt health care cooperatives
- Main proponent was a coop under investigation by FTC:
  - “serious allegations [it] engaged in collective negotiation of physician, hospital, and pharmacy prices.”
Government: repeal of exemption?

- McCarran Ferguson Act
- Senate Judiciary considering repeal
Government: repeal of exemption?

- What difference will repeal make?
- http://www.youtube.com/watch?v=PDWzFA7sT74
“Congress is barking up the wrong tree. Repeal of the measure wouldn't have much effect on health insurers at all ... though it would permit Congressmen to swank around as though they were courageously lowering the boom on an industry with few fans among the voters.”

Michael Hiltzik, Los Angeles Times
“Congress is barking up the wrong tree. Repeal of the measure wouldn't have much effect on health insurers at all … though it would permit Congressmen to swank around as though they were courageously lowering the boom on an industry with few fans among the voters.”

Michael Hiltzik, Los Angeles Times
“The industry itself has gone along with the joke, informing Congress a week ago that the repeal would ‘remedy a problem that does not exist’ – a hint that the lawmakers can score anti-industry points without imposing on the insurers.”
Overview

- Private litigation
Overview

- Private litigation
  - Washington
Sued CON Program

Claim: violates the Sherman Act
  - Absence of “active supervision” by the state
  - MTD: State argues CON program is action of the state itself
Perry v. Rado

- OB claimed conspiracy to exclude him
  - Federal court: MTD
  - State court: summary judgment – HCQIA
Perry v. Rado

- 2009
  - 9th Circuit affirmed MTD
  - Trial court: costs and fees over $386,000
- Dr. Perry is appealing
Medical oncologist sued OMC
- Claim: OMC monopolized
- Corporate practice of medicine MTD

Dismissed
- Antitrust damage claims: LGAA
- CPA claims: State actor
Overview

- Private litigation
  - Outside Washington
Nurse wage cases

- Claim: wages suppressed by agreement of local hospitals
- Tacit price fixing agreement
- Illegal information exchange resulting in fixing wage levels
Nurse wage cases

- Court in Chicago refused certification
- Substantial variation in RN wages would require “19,000 mini trials”
Nurse wage cases

- DOJ entered consent decree with AHHA in 2007
- Private lawsuits followed
- MTD denied in March 2009
  - No labor exemption
St. James Healthcare

- APRN outpatient clinic
St. James Healthcare

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- Claim: hospital and MDs attempted to exclude the nurses from market
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  - Refused to see patients in ED without MD oversight
  - Imposed conditions on nurse referrals to radiology
APRN outpatient clinic

Claim: hospital and MDs attempted to exclude the nurses from market

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Injury to plaintiffs, not to competition
AMA vs. insurers

- Steering within network
- Attack cost data used for out-of-network payments
Institutional pharmacy claim:

- Two payers used merger negotiations to fix rates paid before merger
- Exchanged nonpublic information in merger talks

Summary judgment for defendants
Gun jumping

- May plan for the future
- Wait for closing to implement changes
  - Do not influence or control decisions before closing
- Separate entities
Privileges cases
Privileges cases

- What are they?
Privileges cases

- What are they?
- What happens?
Privileges cases

- What are they?
- What happens?
- Why?
  - No conspiracy
  - No loss of competition
  - Conduct not anticompetitive
  - State action
Four Corners Nephrology

- Mercy Medical Center in Durango recruited nephrologist
  - Exclusive contract
  - Substantial guarantee
- Incumbent nephrologist sued
- Plaintiff’s real beef: excluded from a purported monopoly
  “that, of course, is not what the antitrust laws are about: they seek to advance competition, not advantage competitors”
- Hospitals are not obliged to share facilities with competitors
Two recent developments

- Latest word on bundled discounts
- 9th Circuit test from *Cascade v. PeaceHealth*
- Followed in *Masimo v. Tyco*
Two recent developments

- **UPMC**
- Claim: UPMC and insurer colluded to destroy rival hospital
  - Hired physicians
  - Joint ventures
  - Agreement not to compete with each other
- Dismissed October 29
Questions