



AHLA Annual Meeting 2025

Issue Spotting: What Every GC Needs to Know About Antitrust

 **AMERICAN HEALTH LAW ASSOCIATION**

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1



AGENDA

- > Competitor Collaborations
- > Managed Care Contracting
- > HR and Labor Issues
- > M&A and Affiliation Issues

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2

Competitor Collaborations



3

CNOs and HR representatives from area hospitals formed a workgroup to find ways to mitigate the nursing shortage in the community. For example, they created a shadowing experience to expose high school students to the nursing profession. They share certain information to administer the program (things like schedules and number of participants).

After one of the meetings, your CNO tells you that someone from another hospital told the workgroup about a nurse compensation benchmarking tool. The tool uses wage information from participating hospitals and a proprietary algorithm to recommend what to pay nurses. The representative from the other hospital suggested that all the area hospitals should use the same tool.



Issues?

4



Issues List

- **Collaborations**

- Is there an agreement?
- Does it restrain trade?

- **Information Exchanges & Benchmarking**

- Competitively Sensitive Information
- No more safety zone
- Algorithmic price fixing

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5

Sherman Act § 1



- “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
 - Requires an “agreement”
 - That restrains trade

6

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6

Is There an Agreement?



- **Sherman Act § 1**
 - “Every contract, combination . . . , or conspiracy, in restraint of trade . . . is declared to be illegal.”
- **Requires an “agreement”**
 - Any “meeting of the minds”—whether written or verbal, formal or informal, express or implicit.
 - May be inferred from the circumstances. For example, conversation followed by parallel action.
- **But beware FTC Act § 5**
 - Invitations to collude

7

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7

Does It Restrain Trade?



- **Per Se Rule**
 - Applies to inherently anticompetitive agreements like naked price fixing, market allocation, and bid rigging.
 - Doesn’t apply if agreement is ancillary to procompetitive arrangement.
- **Rule of Reason**
 - Looks at likelihood of competitive harm and potential procompetitive benefits.
 - Applies to all conduct that isn’t per se illegal and conduct that would otherwise be per se illegal but is ancillary to a procompetitive arrangement.

8

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8

Competitively Sensitive Information



- **Dangers of sharing “competitively sensitive information”**
 - Could be evidence of underlying anticompetitive agreement
 - An agreement to exchange highly competitively sensitive information—even without agreement not to compete—could result in harm to competition
- **Information that, if shared, could reduce competition**
 - Prices
 - Wages, benefits, incentives
 - Costs and margins
 - Specific terms of contracts with customers, providers, or suppliers
 - Strategic plans
 - Sales and marketing plans



9

No More Safety Zone



- **2023: DOJ and FTC rescinded Safety Zone**
 - Exchange managed by a third-party
 - Information more than 3 months old
 - At least five providers reporting data
 - No participant accounts for more than 25%
 - Information sufficiently aggregated
- **Recent Enforcement Actions & Interest Statements**
 - U.S. v. Agri Stats (2023): Exchange of price and cost information
 - Hotel case Statement of Interest (2024): “algorithmic price fixing is a per se violation”
 - U.S. v. RealPage (2024): Landlords provided data to RealPage, which provided price recommendation
 - In Re Pork Antitrust Litigation Statement of Interest (2024): Information sharing can violate Section 1 even absent price-fixing.



10

Collaboration Dos and Don'ts



- **Do** create an agenda and stick to it.
- **Do** “noisily withdraw” if conversation veers off track.
- **Do** ensure discussions and documents focus on the procompetitive benefits of collaboration.
- **Do** seek approval of counsel before discussing collaborative solutions to common problems.
- **Do** share only information that is necessary for procompetitive initiatives and is not competitively sensitive.
- **Do NOT** discuss each other’s business strategies, charges, discounts, price terms, wages, benefits, hiring practices, geographic territories, or other competitively sensitive information.
- **Do NOT** suggest the collaboration might enhance, stabilize, or raise rates or suppress, lower, or maintain wages or benefits.
- **Do NOT** complain to other members about low reimbursement, high costs, high wages or other competitive conditions.

Managed Care Contracting



Health insurance company, HealthyWays, operates statewide and covers 80% of the commercially insured population. HealthyWays uses its negotiating leverage to include the following clause in its provider contracts:

Exclusivity Clause: Providers who contract with HealthyWays may not contract with any other health plan or may only do so on materially less favorable terms.

Additionally, HealthyWays uses “most-favored nation” (MFN) clauses that require providers to give HealthyWays the lowest reimbursement rates offered to any other payer.

Issues?

13



Issues List

- **Exclusion**
 - Does exclusivity prevent competitors from assembling desirable networks?
- **Monopsony**
 - Are providers forced to accept below competitive rates for their services?
- **Foreclosure**
 - Is health insurance market less competitive?
 - Is provider services market less competitive?

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14

Sherman Act § 2



- **“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”.”**
 - Conduct must harm competition and not just competitors
 - Possession of market power (acquired through innovation or a better product) is not illegal

15

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15

Is a Monopolization Claim Valid?



- **Is monopoly power present?**
 - Monopoly power = ability to control prices or exclude competition.
 - Typically, high market share is strong evidence (but not conclusive).
 - Courts define the relevant product and geographic market first.
- **Did the firm engage in exclusionary, predatory, or anticompetitive conduct to maintain or enhance its monopoly?**
 - No economic sense test: Would conduct make sense if it did not reduce competition?



16

Managed Care Dos and Don'ts



- **Do** compete on the merits.
- **Do** document legitimate pro-competitive reasons (like ensuring a certain volume or enhance care coordination that will result from contract clauses).
- **Do** limit scope and duration of exclusivity.
- **Do** ensure executives, legal, contracting, and marketing teams understand basic antitrust principles.
- **Do NOT** use exclusivity clauses primarily to block new health plans or provider networks from entering the market.
- **Do NOT** use “most-favored nation” clauses to prevent providers from negotiating competitively with others.
- **Do NOT** bundle or tie product participation without justification.

HR and Labor Issues



Healthy Alliance, a small but growing hospital system new to the region, competes for labor with WellSpring Medical Group, a large independent physician group.

Healthy Alliance and WellSpring's HR executives agree, informally, not to recruit or hire each other's nurses and mid-level providers. The goal is to stabilize staffing and reduce wage pressure.

WellSpring also uses its large presence to pressure staffing agencies into exclusive contracts. Agencies are forbidden from supplying nurses to Healthy Alliance, or they risk being cut off from doing business with WellSpring. As a result, Healthy Alliance struggles to fill shifts and loses contracts with payers due to understaffing

Issues?

19



Issues List

- **Naked Price Fix**
 - Agreements not to hire each other's workers is akin to price fixing and are per se illegal under Section 1
- **Monopolization**
 - WellSpring may be using its market dominance to exclude a competitor under Section 2

20

HR and Labor Issues Dos and Don'ts



- **Do** set compensation and hiring goals independently of competitors.
- **Do** limit scope and duration of provisions if using non-compete, non-solicit, or exclusivity.
- **Do** keep up with state laws and evolving federal standards (e.g., FTC's proposed ban on non-competes).
- **Do** document why any labor-related restraints are necessary when working on joint ventures, ACOs, or other collaborations with competitors.
- **Do NOT** agree formally or informally not to hire from competitors.
- **Do NOT** agree on wages, benefits, or raises with other employers.
- **Do NOT** use overly broad non-compete or non-solicit clauses or retaliate against prior employees when they leave.

M&A and Affiliations Issues



You are the CLO of Suburbia Health, a suburban, vertically integrated health system in Illinois that operates two hospitals, owns a health plan, employs 500 physicians, and operates several ambulatory sites in the area (primarily ASCs and imaging centers).

Suburbia Health's CEO and CSO tell you that a healthcare consulting firm shared a "teaser" sales document with them for the sale of City Health, a large but struggling health system with a tertiary hospital, located in the city center about 20 miles away, and ambulatory assets.

The CEO and CSO have already communicated with the CEO and other senior executives of City Health to discuss the transaction and ways they could build on the existing service-line collaborations between City Health and Suburbia Health. City Health also asked about ways that Suburbia Health could help City Health financially, clinically, and/or operationally pre-closing.

Issues?

23



Issues List

- **Deal Team Guidance**
 - Gun jumping, integration planning
 - Document creation education
- **Premerger Notification**
 - HSR Act filing
 - State notice/filing
- **Merger Analysis**
 - Horizontal analysis
 - Vertical analysis

24

Gun Jumping and Integration Planning



- **HSR Act**
 - Buyer cannot take beneficial ownership or control before waiting period expires
 - Applies regardless of whether parties are competitors
- **Sherman Act § 1**
 - Makes unreasonable restraints of trade unlawful
 - Applies to merging competitors prior to closing
- **Appropriate due diligence and integration planning are allowed**
 - Timing, scope, and persons with access may vary by phase
 - Common safeguards: “clean team” agreement/process and use of third-party advisors
- **Pre-closing collaboration may be possible if doesn’t constitute gun-jumping, violate § 1**

25

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25

Document-Creation Education



- **Documents created for deal or in ordinary course may go to enforcers, become public**
 - HSR filing
 - Voluntary request
 - Second Request
 - Litigation
- **“Document” has very broad meaning**
 - Emails, texts, chats, Word, PPT, spreadsheets (e.g., models), etc.
 - Party and third-party advisor documents
- **Educate deal team on how enforcers use documents and perceive certain words**

26

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26

HSR Act Filing

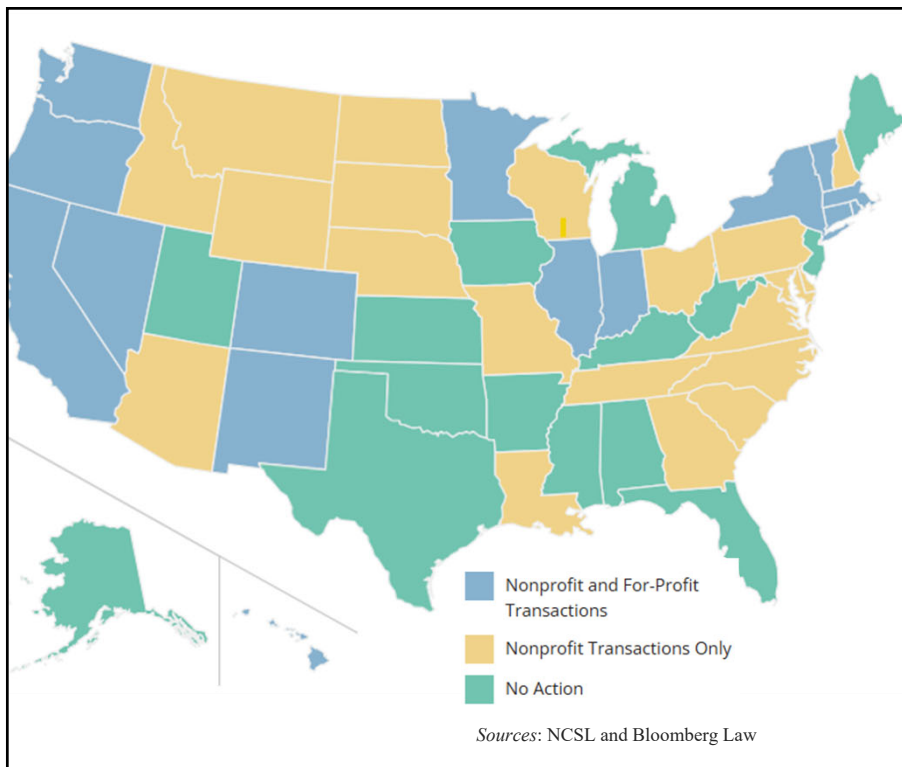


- **Acquiring voting securities, non-corporate (e.g., LLC) interests, or assets?**
- **Exceeds size-of-transaction threshold?**
 - Currently, \$126.4 million
 - Generally, higher of acquisition price (if determined) or fair market value
- **Exceeds size-of-person threshold?**
 - One party with annual net sales or total assets > \$252.9 million
 - Other party with annual net sales or total assets > \$25.3 million
- **Deal structure or exemption makes non-reportable?**
 - E.g., acquiring less than 50% of LLC or LP
- **New HSR form requires significantly more information ... and more time and cost**

27

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27



State Notice/Filing



- 15 states have transaction notification statutes for healthcare entities
- Key requirements vary
 - Covered healthcare entities
 - Transaction value/annual revenue thresholds
 - Filing/review timeline
 - Information required
 - Standard of review
- Several other states are considering legislation

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28

Horizontal Merger Analysis



- **Services line overlaps**
 - Inpatient, outpatient, physician
 - Primary, secondary, tertiary IP
- **Geographic overlaps**
 - Map, list of locations
 - Primary service areas
- **Competitors and metrics**
 - Market shares – >30%
 - Concentration (HHI) – 1800, Δ100
 - Diversion ratios
- **Competitive effects**
 - Rate comparison
 - Documentary evidence
 - Client interviews
- **Failing/flailing firm analysis**
 - Financial condition of seller
 - Other buyers?
- **Efficiencies**
- **Entry (CON law?)**
- **Red flags?** E.g., hot docs, closest competitors, shares, complaints?

29

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29



Vertical Merger Analysis

- **Ability and incentive to foreclose rivals?**
- **Vertical relationships in area**
 - Providers in/excluded from health plan
- **Upstream/downstream alternatives to parties**
 - Other health plans in area?
 - Other providers (e.g., tertiary) in area?
- **Metrics**
 - Health plan share – >50%
 - Provider service line shares – >50%

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30

QUESTIONS?



31



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32