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Antitrust: What Physicians Need to Know

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Disclosures:
No financial conflicts of interest





Learning Objectives

At the conclusion of the presentation, learners will be able to:

- Describe the purpose and mechanics of antitrust laws and explain why it is a powerful legal theory;
- Summarize how antitrust laws have been used – successfully and unsuccessfully - by osteopathic physicians to advance practice rights;
- Explain how antitrust laws are particularly relevant to the healthcare industry.

What is Antitrust?



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Statutes and History

Competition as the Key

- Sherman Act (1890)
- Clayton Act (1914)
- Fed'l Trade Commission Act (1914)

- Hart Scott Rodino Antitrust Improvements Act (1976)
- State Antitrust Laws



Standard Oil Break Up (1911) into 7 separate companies

The Letter of the Law

“**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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.”

- 15 U.S. Code § 1



Antitrust Exceptions

- Intellectual Property (patent, copyright)
- Baseball (*Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*)
- The Match (15 U.S.C. § 37b)
- Insurance (McCarran-Ferguson Act)*
- State Action
- Noerr-Pennington



Antitrust – The Powerful Threat

- CIVIL and CRIMINAL statute
- Damages: TREBLE DAMAGES and ATTORNEYS' FEES
- Multiple Enforcement Sources: Dept. of Justice, FTC, State Attorneys General, Private Attorney Generals
- Class Action
- INSURANCE challenges
- Complex And Expensive Defense



The Litigation Challenge

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Osteopathic Medicine and the Antitrust Laws



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Practice Rights for Osteopathic Physicians

- *Malcolm Weiss DO v. York Hospital (1984)*

In 1976, Dr. Weiss applied to the York Hospital for staff privileges. Weiss's application was denied by the York Hospital Board of Directors on June 30, 1977. . . . In this lawsuit, Weiss challenges the Defendants' alleged abuse of monopoly power in the delivery of inpatient hospital health care services in the York Medical Service Area to the detriment of osteopathic physicians.

- *Corey Welchlin, DO and Richard Banks, DO v. Tenet Healthcare Corp. (2005)*

- Two osteopathic physicians, sued the various Defendants here claiming . . . that the Defendants conspired to limit or prevent osteopathic practitioners from practicing at the Medical Center by adopting a bylaw that required physicians seeking hospital privileges to be certified or eligible for certification by a board recognized by the American Board of Medical Specialties
- If it is ultimately proven that Defendants refused to refer patients to Plaintiffs as part of their unlawful conspiracy, this could similarly establish that consumers and competition were harmed by Defendants' alleged practices by facing artificially high practices or depriving consumers of fair choice among providers of medical services.

Practice Rights for Osteopathic Physicians

Gerhard Flegel DO and Richard Still DO v. Christian Hospital NE-NW (1992)

Defendants allege that the change in the Department of Surgery requirements was initiated to maintain and increase the quality of care within the department, . . . to respond to community concerns about the quality of the specialists on the staff, and to satisfy recommendations made by hospital accrediting organizations such as the Joint Commission for Accreditation of Hospital Organizations.

Plaintiffs allege that the changes were instituted after a letter was written by Defendant Richard Blath, an M.D. urologist, to the Vice President in charge of Medical Affairs at CHNE-NW, . . . Plaintiffs further allege that this led to the formation of the Ad Hoc Committee of the Department of Surgery regarding criteria for surgery applicants, . . . wherein defendant Blath's letter was reviewed along with the memorandum of the Vice President of Medical Affairs, which discussed among other things how he believed the hospital would formulate criteria for admission to the staff without violating antitrust law.

Practice Rights for Osteopathic Physicians

Gerhard Flegel DO and Richard Still DO v. Christian Hospital NE-NW (1992)

In the present case, the same standards are applied to both osteopathic (D.O.) and allopathic (M.D.) physicians. Assuming that the standards were based upon allopathic, rather than osteopathic, standards, they were still applied equally to all applicants. In addition, the osteopathic requirements for surgical subspecialty had been increased prior to plaintiffs' application to match that of the allopathic physicians.

The behavior alleged by plaintiffs in the present action does not fall into a category likely to have predominately anticompetitive effects and does not apply markedly different standards to osteopaths and allopaths as the hospital in *Weiss* did. . . . Plaintiffs have produced no evidence which would show that the economic impact of denial of staff privileges for plaintiffs at CHNENW is immediately obvious. The number of patients which Drs. Flegel and Still treated rose substantially from 1988 to 1990. In addition, CHNE-NW does not possess market power in any properly defined relevant market.

Antitrust Impacting Healthcare

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Medical Regulation

Scope of Practice Issues:

- *Chester Wilk, DC v. American Medical Association (1990)*
- *North Carolina Dental Examiners vs. Federal Trade Commission (2015)*
- *Teledoc v. Texas Medical Board (2017)*



Hospital Mergers: Vertical and Horizontal

St. Alphonsus Medical Center v. St. Luke's Health System (2015).

Chicago hospital system scraps merger over U.S. antitrust concern (March 2017)

7 proposed Hospital mergers called off in 2019

Healthcare antitrust experts are disappointed that the federal government's **new proposed guidelines** on vertical mergers give little detail on how the government will analyze deals between organizations across the delivery system, such as hospitals and physician groups. (January 2020)



Other Healthcare Transactions

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Discussion & Questions

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Thank You!

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