

## Antitrust Aspects of Health Information Sharing by Public & Private Health Insurers

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## Value Purchasing

- Use of provider performance data to develop benefit, pricing and payment innovations
- Goal is to reward high performance and incentivize improvements → attractive to both provider & payer
- Federal effort has been ongoing for years
- A common strategy = evidence informed case rate
- Issue: does collaboration among public/private insurers implicate federal antitrust laws?

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## Why not collaborate?

- Trade secrets
  - Excellus/UCR case in New York
- Sherman Act, section 1
  - Horizontal versus Vertical arrangements
  - Price-fixing
- Are there exceptions or “safe harbors” in the name of quality improvement?

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## Antitrust: Sherman Act § 1

- Objective is to eliminate practices that interfere with free competition
- 3 elements for violation
  - Existence of a contract/conspiracy
  - Unreasonable restraint of trade
  - Affecting interstate or foreign commerce
- Insurers agreeing to new payment models through provider contracts could violate

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## Proof of Concerted Activities

- Horizontal arrangements by competitors
- Was there a rational motive to conspire?
- Defenses to a Sherman Act violation
- “Conscious parallelism”
  - independent adoption of new pricing models ok

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## Unreasonable Restraints on Trade

- Actions that unreasonably restrain trade are illegal
- 2 methods used to determine whether conduct is unreasonable
  - Per se violation
  - Rule of reason violation
- Defendants prefer rule of reason

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## Agreements on Price

- Value purchasing could be viewed as an agreement on price among competitors
- Usually a “per se” violation
- Many flavors of price-fixing deemed illegal
- Exchanges of price information ok in some circumstances → “rule of reason” used

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## Antitrust Agency Guidelines

- DOJ & FTC have addressed information exchanges in health care, created safe harbors
- 1996 Statements 5, 8 and 9
- Guidelines for Collaborations among Competitors is applicable to insurers
- No easy fit into a safe harbor for value purchasing

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## State Action Doctrine

- Presence of “state action” may limit antitrust liability exposure
- Parker immunity → 3 elements
- Much activity at state level, but may not rise to level of “state action” for immunity
- Minnesota/Rochester IPA examples

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## Next steps, options

- Information sharing alone is not the problem
- Achieve state action through state legislature
- Use a safe harbor through the integration of financial risk
- Beware of collective bargaining

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