Morgan Lewis

ANTITRUST DEVELOPMENTS FOR HEALTHCARE INSURANCE PROVIDERS

July 21, 2021

Daniel S. Savrin
Ryan M. Kantor
Molly R. Maidman

Overview of Topics

- An Overview of Antitrust Law
- FTC and DOJ Enforcement in the Healthcare Insurance Space
- The Competitive Health Insurance Reform Act (CHIRA)
- Updates on Private Antitrust Litigation in the Healthcare Insurance Space
- No-Poach Litigation and Enforcement

An Overview of Antitrust Law

Morgan Lewis

General Principles

- Antitrust law is concerned with the protection of the ***competitive process***.
- What general types of conduct are prohibited?
  - Contracts, combinations, and conspiracies “in restraint of trade or commerce”
  - Monopolization, attempted monopolization, conspiracy to monopolize
- The antitrust laws are enforced by the FTC, the DOJ, state attorneys general, and private parties.
- Corporate defendants may face **civil penalties**, **treble damages**, **legal fees**, **business disruption,** and **prohibitions** or **conduct restraints with respect to future practices**.
- Corporate and individual defendants may face **fines** and **jail time** in certain circumstances.

What Constitutes Prohibited Conduct?

- The antitrust laws prohibit **agreements** (written, oral, or otherwise) between market participants "in restraint of trade."
- Examples include price fixing, bid rigging, market allocation, and market foreclosure.
- **Monopolization** refers to actions by a dominant company **to prevent or exclude competition**.
- The possession of monopoly power—alone—is not illegal. But a monopolist cannot use (or attempt to use) its monopoly power to exclude competitors.
  - Monopolization is assessed with reference to a "**relevant market**"

How Do Courts Assess Antitrust Cases?

Per Se Illegality v. Rule of Reason

Price fixing, bid rigging, market allocation, output restriction

Anticompetitive effects outweigh procompetitive benefits

Procompetitive benefits outweigh anticompetitive effects

Enforcement Trends in the Health Insurance Space

Morgan Lewis

Executive Order on Promoting Competition in the American Economy

- Order focuses on four areas of the healthcare industry where a lack of competition is causing increased prices and reduced access to quality care:
  - Health insurance
  - Hospital consolidation
  - Prescription drugs
  - Hearing aids
- Two premises of the Executive Order are that: (1) consolidation in the health insurance industry has limited choices for consumers; and (2) selecting a plan is difficult because plans offered on exchanges are complicated to understand.
- The President has directed HHS to standardize plan options in the National Health Insurance Marketplace.

Executive Order 14036

- "[T]o ensure that Americans can choose health insurance plans that meet their needs and compare plan offerings, [the Secretary of Health and Human Services shall] implement standardized options in the national Health Insurance Marketplace and any other appropriate mechanisms to improve competition and consumer choice[.]"
- "The Secretary of Health and Human Services shall: . . . (ii) support existing price transparency initiatives for hospitals, other providers, and insurers along with any new price transparency initiatives or changes made necessary by the No Surprises Act (Public Law 115-260, 134 Stat. 2758) or other statutes[.]"

Exec. Order No. 14036, 86 Fed. Reg. 36987, 36997 (Jul. 14, 2021).

Trends in Enforcement

- Biden appointees
  - Lina Kahn, Chair of the FTC
  - Jonathan Kanter, AAG of DOJ Antitrust (nominee)
  - Xavier Becerra, Secretary of Health and Human Services
  - Tim Wu, White House National Economic Counsel
- Legislative efforts to address health care antitrust concerns
  - Competition and Antitrust Law Enforcement Act
  - Trust Busting for the Twenty-First Century Act: A Plan to Bust Up Anti-Competitive Big Businesses

Government Enforcement Actions

- DOJ and FTC are likely to pursue more enforcement actions against health insurers and those in the healthcare industry.
  - FTC began conducting a study in January 2021 that is examining how different types of consolidation impacted the health care industry by looking at data provided by six major insurance companies.
- Potentially more scrutiny related to health care deals at the state level.
  - States' Attorneys General are focusing on enforcement in the health care industry.
  - More investigation of transactions and collaborations.

DOJ Health Insurer Merger Enforcement

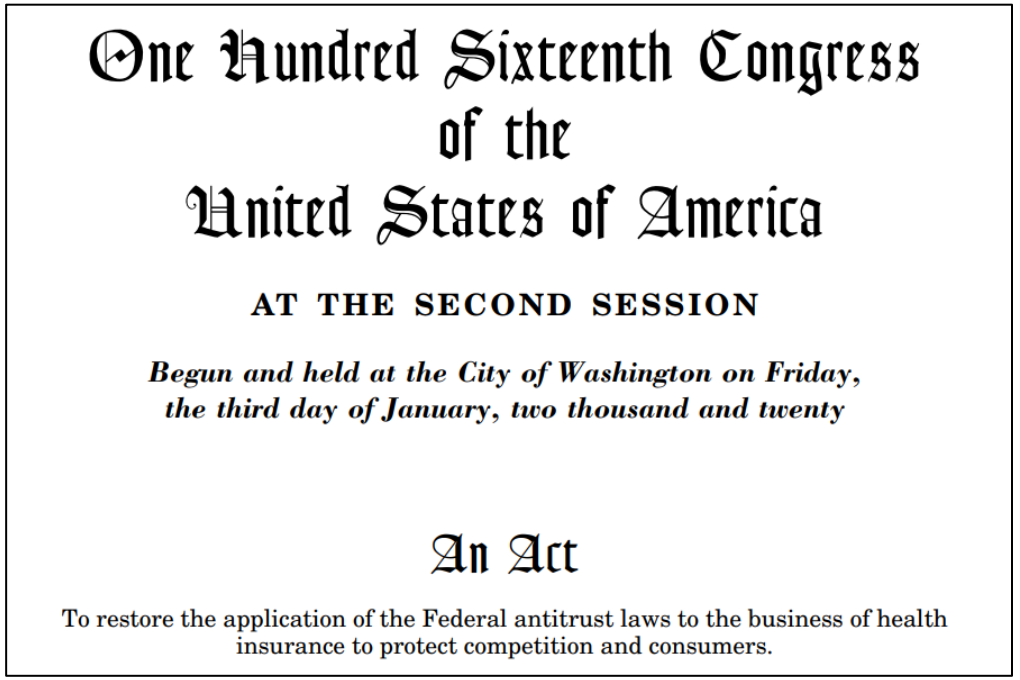
- Aggressive against horizontal consolidation
  - Blocked Anthem's proposed acquisition of Cigna and Aetna's proposed acquisition of Humana
- Allowed recent vertical consolidation
  - CVS acquired Aetna (with limited divestitures due to horizontal competition in PDP plans)
  - Cigna acquired Express Scripts

The Competitive Health Insurance Reform Act (CHIRA)

Morgan Lewis

The Competitive Health Insurance Reform Act (CHIRA)

- H.R. 1418 – An act to restore the application of the federal antitrust laws to the business of insurance to protect competition and consumers.
- Signed into law on January 13, 2021.
- The legislative history reveals that Congress was concerned that McCarran-Ferguson had created a "loophole" that allowed the health insurance industry to operate without substantive exposure to federal antitrust liability. CHIRA was promoted as a way to increase competition in health insurance markets and to lower healthcare costs.



One Hundred Sixteenth Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, two thousand and twenty

An Act

To restore the application of the Federal antitrust laws to the business of health insurance to protect competition and consumers.

Elimination of the Antitrust Exemption for the "Business of Health Insurance"

- 15 U.S.C. § 1013(c)(1) – "Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits)."
  - The "business of health insurance" is defined to exclude (i) "the business of life insurance (including annuities)" and (ii) "the business of property or casualty insurance."
- Section 13(c)(1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy:
  - (A) to collect, compile, or disseminate historical loss data;
  - (B) to determine a loss development factor applicable to historical loss data;
  - (C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade;
  - (D) to develop or disseminate a standard insurance policy form . . . if such contract, combination, or conspiracy is not to adhere . . . or require adherence to such standard form.

Incorporation of FTC Act Section 5

- CHIRA expressly incorporates Section 5 of the Federal Trade Commission Act ("FTC Act") and makes it applicable to the business of health insurance "without regard to whether such business is carried on for profit."
  - Compare FTC Act Section 4, which limits application of the FTC Act to for-profit enterprises.
- FTC Act Section 5 gives the FTC broad power to challenge:
  - "unfair methods of competition"
  - "unfair or deceptive acts or practices"
- FTC enforcement may be undertaken via investigation, internal administrative proceeding, or federal litigation (in certain circumstances). The FTC may also conduct industry studies without express investigative or enforcement purpose under FTC Act Section 6(b).

Implications for Insurers

- CHIRA eliminates defenses that, in practical effect, made it difficult to sue health insurance providers under the federal antitrust laws.

Defense	Available Pre-CHIRA?	Available Post-CHIRA?
The challenged practice is part of the "business of insurance"	YES	NO
The challenged practice is regulated by state law	YES	NO
The target insurer operates on a not-for-profit basis	YES	NO

- McCarran-Ferguson provided substantial disincentives to private and governmental plaintiffs; many of the disincentives have now been eliminated:
  - The need to prove that the challenged conduct was not part of the "business of insurance"
  - The absence of an applicable state regulatory regime
  - Operation as a not-for-profit enterprise

CHIRA – Looking Ahead

- While the implications of CHIRA will continue to become more apparent, we should anticipate:
  - Increased federal antitrust regulatory scrutiny
    - A DOJ Antitrust Division press release following the passage of CHIRA stated that CHIRA will "assist the Antitrust Division in its mission to enforce the antitrust laws by narrowing [McCarran-Ferguson's] defense and clarifying that, except for certain activities that improve health insurance services for consumers, the conduct of health insurers is subject to the federal antitrust laws."
    - We may also see increased FTC investigatory activity under FTC Act Section 6(b), administrative proceedings under FTC Act Section 5, and federal court litigation under FTC Act Section 13(b).
  - Increased potential for private civil antitrust litigation, including by providers and insureds
    - Private antitrust plaintiffs (and their attorneys) have significant incentives to pursue litigation because of the availability of treble damages.

Private Antitrust Litigation in the Health Insurance Space

Morgan Lewis

In re Blue Cross Blue Shield Antitrust Litigation

- *In Re: Blue Cross Blue Shield Antitrust Litigation* (MDL No. 2406) (N.D. Ala. No. 2:13-CV-20000).
- Class action antitrust lawsuit in the Northern District of Alabama brought against the Blue Cross Blue Shield Association and its 35 member companies.
- Plaintiffs alleged that BCBS violated antitrust laws by entering into agreements that limited competition among Blue Plans, which reduced provider reimbursements and elevated health insurance premiums.
- Settlement reached with some Defendants in October 2020. Parties agreed to:
  - make changes to their business practices that increase competition in the health insurance market; and
  - allow qualified national self-funded accounts to request second bids for coverage from member plans of their choice.

In re Blue Cross Blue Shield Antitrust Litigation

- Litigation still proceeding for the remaining Defendants.
- Recently the Court decided to re-consider the standard of review for Plaintiffs' Sherman Act and group boycott claims.
  - Initially court used a rule of reason standard.
- Blue Cross Blue Shield Defendants argued that Plaintiffs' Section 1 claims should still be evaluated under the rule of reason standard, rather than the *per se* standard of review.
- Currently, the court is reviewing summary judgment motions filed by both sides.

California ex rel. Becerra v. Sutter Health

- *California ex rel. Xavier Becerra v. Sutter Health* (Cal. Super. Ct. No. 18-565398).
- In 2018, the CA Attorney General and numerous private plaintiffs filed a lawsuit against Sutter Health.
- Claim: Sutter Health violated California's state antitrust statute by:
  - Using "all-or-nothing" contracting, anti-steering, and anti-price transparency provisions.
  - Requiring that health plans that offer any Sutter Health provider must also offer every other Sutter Health provider (system-wide contracting).
  - Prohibited health plans from offering incentives to use lower-cost or higher-quality facilities.
  - Restricted disclosure of its prices.

California ex rel. Becerra v. Sutter Health

- December 2019 – Sutter Health agreed to pay $575 million to settle the antitrust claims brought by the California AG, unions, and employees.
- Under the settlement agreement Sutter Health is:
  - Prohibited from engaging in the “all or nothing” agreements that required insurers to include all of Sutter Health’s facilities, if they wanted to include any of the facilities.
  - Required to limit the amount it charges patients for out-of-network services.
- March 2021 – Judge granted preliminary approval of the settlement agreement.

Sibide v. Sutter Health

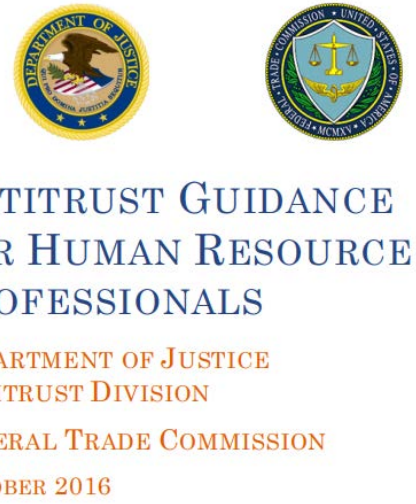
- *Sibide v. Sutter Health* (N.D. Cal. No. 12-cv-04854).
- Case was brought by plaintiffs who purchased commercial health insurance from plans that contracted with Sutter Health.
- Main issue**:** whether Sutter Health violated the Sherman Act and California's antitrust statute by requiring that insurance providers include all Sutter Health hospitals in their networks if they wanted to include any of the networks, thereby causing patients to pay higher premiums, particularly in markets where Sutter Health faced competition.
- March 2021 - Sutter moved for summary judgment
  - Summary judgment granted:
    - On claims related to conduct between 2008 and 2010.
    - On monopolization and attempted monopolization claims.
  - Summary judgment denied:
    - On claims related to market power.
- Case set for trial in October 2021.

No-Poach Litigation and Enforcement

Morgan Lewis

Overview – Recent Developments in Private No-Poach Litigation

- Antitrust Guidance for Human Resource Professionals jointly issued by the Department of Justice and the Federal Trade Commission in October 2016
  - "An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities."



- The Guidance contemplates both government enforcement and private civil litigation:

  "[I]f an employee or another private party were injured by an illegal agreement among potential employers, that party could bring a civil lawsuit for treble damages (i.e., three times the damages the party actually suffered)."

Criminalizing Wage-Fixing & No-Poach Agreements

- **DOJ and FTC Joint Announcement**
  - **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain "naked" wage-fixing and no-poach agreements
- ***Per se* unlawful**
  - Naked wage-fixing
    - Agreement "about employee salary or other terms of compensation, either at a specific level or within a range"
  - No-poach agreements
    - Agreement "to refuse to solicit or hire [an]other company's employees"

DOJ Civil Enforcement Action

- *U.S. v. Knorr-Bremse et al.*: lawsuit against "two of the world's largest rail equipment suppliers"
  - German private company and US company, both with US subsidiaries
  - "No-poach" agreements with each other and a third rail equipment supplier based in France
  - *Per se* unlawful horizontal market allocation agreements

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Tuesday, April 3, 2018

Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees

Settlement Prohibits Companies from Maintaining Employee "No-Poach" Agreements and Requires Cooperation in Ongoing Antitrust Division Investigation of Such Agreements

The Department of Justice announced today that it has reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world's largest rail equipment suppliers, to resolve a department lawsuit alleging that the companies had for years maintained unlawful agreements not to compete for each other's employees. The lawsuit further alleges that the companies entered into similar "no-poach" agreements with rail equipment supplier Faiveley Transport S.A. before Faiveley was acquired by Wabtec in November 2016.

The Justice Department's Antitrust Division filed a civil antitrust lawsuit today in the U.S. District Court for the District of Columbia to challenge Knorr and Wabtec's no-poach agreements. At the same time, the department filed a proposed settlement that, if approved by the court, would resolve the department's competitive concerns and restore competition for employees, to the benefit of U.S. workers.

"The unlawful no-poach agreements challenged today restrained competition for employees and deprived rail industry workers of important opportunities, information, and the ability to obtain better terms of employment," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "Today's settlement will restore competition for employees in the U.S. rail industry."

- Consent Judgment Terms
  - Seven-year term
  - Appoint antitrust compliance officer
  - Annual compliance certification by CEO or CFO and General Counsel
  - DOJ may "inspect and copy" records and obtain interviews
  - Notice to all US employees, recruiting agencies, rail industry
  - Ongoing cooperation with DOJ

Private No-Poach Litigation Predated the HR Guidance

- *In re: High-Tech Employee Antitrust Litigation* (N.D. Cal. No. 11-CV-2509-LHK)
  - Filed May 2011
  - Class claims brought by current and former employees against: Adobe Systems, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar.
  - Plaintiffs allege: "Defendants' senior executives entered into an interconnected web of express agreements to eliminate competition among them for skilled labor. This conspiracy included: (1) agreements not to recruit each other's employees; (2) agreements to notify each other when making an offer to another's employee; and (3) agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer."
  - Settled in September 2015 for $415 million.
- Another example: *Cason-Merenda v. VHS of Michigan, Inc.* (E.D. Mich. No. 06-CV-15061) – class action brought by nurses alleging that Detroit-area hospitals entered into no-poach agreements; settled for $90 million in 2016 after ten years of litigation.

Key Takeaways from Recent Litigation

- Private civil lawsuits stemming from no-poach agreements have affected a variety of industries and sectors: fast food, higher education, and technology. The trend is not industry-specific and similar lawsuits are likely to affect other industries as well, including health insurance.
- Claims may be brought under both federal and state competition laws.
- Fundamental questions remain whether courts will deem no-poach agreements illegal *per se* in the context of private, civil lawsuits.
- Interesting questions also remain regarding class certification and the extent to which courts will certify broad classes of employees, as opposed to more narrow classes of particular types of employees. In *Duke University*, for example, the court approved a narrower class than the class for which the plaintiff sought certification, reasoning that faculty and non-faculty employees were not similarly situated and that their claims would involve divergent proof.

Daniel Savrin

Boston
+1.617.951.8674
daniel.savrin@morganlewis.com

Daniel is a nationally-recognized litigator at the trial and appellate levels with a broad practice representing clients in high-stakes class actions, government enforcement actions, and other commercial litigation with a focus on antitrust, consumer protection, and civil and criminal government investigation matters. Daniel has appeared before federal and state courts in more than 30 states, and is listed in leading peer review guides, including being ranked as Band 1 for Antitrust by Chambers USA where he is described as a “highly regarded practitioner noted for his abilities across civil and criminal antitrust investigations and enforcement proceedings” and as “an expert in consumer protection matters”.

Ryan Kantor

Washington, DC
+1.202.739.5343
ryan.kantor@morganlewis.com

Ryan Kantor's practice focuses on federal and state government antitrust investigations, antitrust litigation, and counseling on antitrust and competition issues. He represents clients before the US Federal Trade Commission, US Department of Justice (DOJ), state attorneys general offices, and in federal and state courts. Ryan previously served as assistant chief of the Healthcare and Consumer Products section in the DOJ's Antitrust Division.

Molly Maidman

Boston
+1.617.341.7996
molly.maidman@morganlewis.com

Molly Maidman focuses her practice on antitrust investigations, antitrust litigation, and compliance counseling. Prior to joining Morgan Lewis, Molly worked as an associate at a global law firm.

Morgan Lewis – Antitrust Accolades and Credentials

Law360
Competition
Practice Group of the Year

(2017 - 2020)

Tier 1, Antitrust Law and Litigation-Antitrust
US News/Best Lawyers – Best Firms

(2018 - 2021)

15 partners recognized by *Chambers*, all publications

(2021)

Recognized in 6 jurisdictions by *Global Competition Review*

(2021)

Recommended, *The Legal 500 US* for Antitrust: Civil Litigation/Class Actions Defense; Cartel; and Merger Control

(2021)

Morgan Lewis

THANK YOU

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington

Morgan Lewis