

ANTITRUST

What are the antitrust laws and what do they prohibit?

In general, the antitrust laws are federal and state laws designed to:

- Promote competition.
- Prevent contracts, combinations, and conspiracies in restraint of trade.
- Prohibit attempts to monopolize, conspiracies to monopolize, and actual monopolies.
- Prevent mergers and acquisitions which tend to create a monopoly or substantially lessen competition.
- Prevent unfair trade practices and unfair methods of competition.

Who enforces the antitrust laws?

The antitrust laws are enforced by:

- The Antitrust Division of the Department of Justice,¹ which has both civil and criminal jurisdiction to enforce the federal antitrust laws.
- The Federal Trade Commission,² which has civil, but not criminal, jurisdiction to enforce the federal antitrust laws.
- The Washington State Attorney General's office, which has authority to enforce the state antitrust laws.
- Private individuals, who may bring private actions for damages resulting from antitrust violations under state or federal law.

Are physicians or physician practices bound by the antitrust laws?

Yes.

What are some of the kinds of physician activities which might have antitrust implications?

Because application of the antitrust laws is complex and extremely fact specific, it is not possible to delineate all of the ways physicians might run afoul of the antitrust laws. Some

¹ <http://www.justice.gov/atr/>

² <http://www.ftc.gov/>

examples, however, of physician activities which would unquestionably be antitrust violations include such things as:³

- Conspiracies or agreements among competing physicians or physician groups to fix prices for health care services.
- Conspiracies or agreements among competing physicians or physician groups as to what services will be offered or what patients will be treated.
- Conspiracies or agreements among competing physicians or physician groups not to deal with particular entities, competitors, or managed care plans.

Some other examples of physician activities which may, depending upon the factual circumstances, have antitrust implications include such things as:

- Collective exchange of fee related information to purchasers of health care services by competing physicians or physician practices.
- Collective exchange of non-fee related information to purchasers of health care services by competing physicians or physician practices.
- Collective exchange of price and cost information among competing physicians or physician practices.
- Joint purchasing agreements among competing physicians or physician practices.
- Certain physician network joint ventures such as independent practice arrangements (IPAs), physician-controlled preferred provider organizations (PPOs), and other physician-controlled managed care organizations (MCOs).
- Certain exclusive dealing arrangements or exclusive contracts with hospitals or with managed care plans.
- Certain collective negotiations with health plans by competing physicians or physician practices.
- Exclusion of other physicians by a physician-controlled network joint venture.
- Certain adverse hospital privileging decisions.

³ Sherman Anti-trust Act and other guiding law. 15 U.S.C. §1, 2, 15, 18, 45. 15 U.S.C. §45, 1.1, 1.2, 1.3, 1.4; 28 C.F.R. 50.6.

Because the determination whether specific conduct violates the antitrust laws requires an extremely complex and fact-specific analysis, physicians engaging in activities which may have antitrust implications are well-advised to seek expert legal advice. A summary of federal and state antitrust laws is available at the Washington State Attorney General's web site, <http://www.atg.wa.gov/antitrustguide.aspx>.

Have the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued any guidelines or policy statements concerning antitrust enforcement in health care?

Yes. The DOJ and the FTC have issued "Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust" which address the following topics:⁴

- Mergers among hospitals.
- Hospital joint ventures involving high technology or other expensive health care equipment.
- Hospital joint ventures involving specialized clinical or other expensive health care services.
- Providers' collective provision of non fee related information to purchasers of health care services.
- Providers' collective provision of fee related information to purchasers of health care services.
- Provider participation in exchanges of price and cost information.
- Joint purchasing arrangements among health care providers.
- Physician network joint ventures.
- Analytical principles relating to multiprovider networks.

You may contact the Antitrust Division regarding business review letters by writing or calling: Legal Procedure Unit; Antitrust Division U.S. Department of Justice, Suite 215, 325 7th St., NW, Washington, D.C. 20530. The phone number is (202) 514-2481. They can also be accessed online from the FTC's website at www.ftc.gov.

⁴ <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>.

Can physicians who are considering engaging in an activity addressed in the policy statements obtain an advisory opinion on the legality of their conduct under the antitrust laws from the DOJ or the FTC?

Yes.⁵ Physicians and other providers who are considering doing any of the things addressed in the policy statements and are unsure of the legality of their conduct under the federal antitrust laws can take advantage of the DOJ's expedited business review procedure for joint ventures and information exchange programs or the FTC's advisory opinion procedure.

The length of time necessary to respond to a request for an advisory opinion will vary depending on several factors, including the nature and complexity of the issues posed by the proposed conduct, the magnitude and sufficiency of the request and supportive information provided with the initial request, the time it takes for the opinion requester to respond to any requests from staff for additional information, and whether the opinion will be issued by the Commission or the Commission staff, among other things. Some advisory opinions have been issued within a matter of weeks after the request was filed, although it is more typical for opinions to take at least several months before the process is completed and an opinion is issued. Subject to statutory restrictions, FTC rules and the public interest, the FTC may make public its advisory opinions and the requests therefrom. The DOJ's business review letters and requests therefore are available to the public upon request for one year after issuance of the business review letter. Physicians and other providers who wish to take advantage of the DOJ's expedited business review procedure or the FTC's advisory opinion procedure are well-advised to seek the assistance of experienced legal counsel. While Commission and FTC staff advisory opinions may have persuasive value, they are not binding on courts, other governmental entities, or private parties. Consequently, advisory opinions should not be considered to provide immunity from legal challenge by others to the conduct at issue, or from contrary or adverse legal determinations by courts or other decisional bodies.

To formally request an advisory opinion, file the request with the Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 135-H, Washington, D.C. 20580, in the manner prescribed by Commission Rule 4.2(d)(1).⁶ The request should include one original, plus two paper copies, and an electronic copy on CD or DVD. For a request concerning health-care antitrust and competition issues, also send two additional copies directly to the Assistant Director, Health Care Division, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. There is no fee for filing an advisory opinion request or receiving an advisory opinion. Parties also may obtain less formal advice regarding a proposed course of action by contacting FTC staff to discuss issues relating to proposed conduct.

Is there a topical index of Antitrust Advisory Opinions made by FTC staff?

⁵ <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf> (May, 2010)

⁶ 16 C.F.R. § 4.2(d).

Yes. A range of topics are addressed at the following link:

<http://www.ftc.gov/bc/adops/indexfin1112.pdf>.

Has Washington State enacted any laws to provide antitrust exemptions or antitrust immunity to physicians involved in managed care competition?

Yes. The Washington State Legislature has enacted provisions which exempt from state antitrust laws, and provide immunity from federal antitrust laws through the state action doctrine,⁷ certain activities that might otherwise be ⁸constrained under those laws. Such exemption from state antitrust laws, and immunity from federal antitrust laws under the state action doctrine, apply only to activities explicitly permitted by rules adopted by the Department of Health⁹ or specifically approved by the Department of Health in a written decision on a petition for approval of conduct that could tend to lessen competition in a relevant market.

In granting such exemption from state antitrust laws and immunity from federal antitrust laws, the Washington State Legislature explicitly does not authorize any person or entity to engage in activities that would constitute per se violations of state and federal antitrust laws, which for physicians include, but are not limited to, conspiracies or agreements among competing physicians to fix the price of their services, not to grant discounts, or not to provide services.¹⁰

Has the state Department of Health adopted rules specifically permitting any cooperative activities among competing health care providers for which there may be antitrust exemption and immunity?

Yes.¹¹ Although the Department of Health has stated that it would not yet be appropriate to establish with precision specific areas where cooperative activities are entitled to immunity from antitrust laws, as an interim policy, it has adopted the DOJ and FTC's Statements of Enforcement Policy and Analytical Principles Relating to Antitrust discussed above.

Has the state Department of Health adopted any rules specifically permitting any collective negotiation by competing health care providers of contracts with health carriers for which there may be antitrust exemption and immunity?

Yes,¹² but only with respect to specified non-fee-related terms and conditions of contracts with health carriers, only if done through an authorized third-party representative, and only if done in conformance with specified criteria. Given the complexity of the criteria and the limitations placed on collective negotiations, competing physicians contemplating engaging in

⁷ RCW 43.72.310; WAC 246-25-20 through -050.

⁸ RCW 43.72.300(2); WAC 246-25-025.

⁹ RCW 43.72.310.

¹⁰ RCW 43.72.300(3).

¹¹ WAC 246-25-030.

¹² WAC 246-25-040.

collective negotiations are well-advised to first seek advice from experienced legal counsel. Physicians, or other health care providers, who exceed the authority granted by the Department of Health with respect to collective negotiations face the prospect of legal action against them for violation of state and federal antitrust laws.

What terms and conditions of contracts with health care providers are competing physicians permitted by the Department of Health to collectively negotiate if they do so in conformance with the criteria specified by the Department of Health?

Under the collective negotiation rules adopted by the state Department of Health, competing health care providers within the service area of a health carrier may meet and communicate for purposes of collectively negotiating the following terms and conditions of contracts with health carriers, provided they do so in complete conformance with criteria specified by the Department of Health:¹³

- Respective provider and health carrier liability for the treatment or lack of treatment of health carrier enrollees.
- Administrative procedures including methods and timing of provider payment for services.
- Dispute resolution procedures relating to disputes between health carriers and providers including disputes between providers and health carriers that originate from enrollees.
- Patient referral procedures.
- With specified exceptions, formulation and application of reimbursement methodology, e.g., risk pools, capitation, and capitation between providers and hospitals.
- Quality assurance programs.
- Health service utilization review procedures.
- Carrier provider selection and termination criteria, or whether to engage in selective contracting.

¹³ WAC 246-25-040(2).

Competing health care providers, however, cannot meet and communicate for the purposes of collectively negotiating any of the following terms and conditions of contracts with health carriers:¹⁴

- The fees or prices for services, including those arrived at by applying any reimbursement methodology procedures.
- The conversion factor in a resource based relative value scale reimbursement methodology or similar methodologies.
- The amount of any discount on the price of services to be rendered by providers.
- The dollar amount of capitation or fixed payment for health services rendered by providers to health carrier enrollees.
- The inclusion or alteration of terms and conditions to the extent they are the subject of government regulation prohibiting or requiring the particular term or condition in question; however, such restriction does not limit providers' rights to collectively petition government for a change in such regulation.

To what criteria must competing health care providers' permitted collective negotiations with health carriers conform?

Competing health care providers' exercise of the collective negotiation rights permitted by Department of Health rules must conform to the following criteria:¹⁵

- Providers must communicate or negotiate with health carriers through a third party who is authorized by the providers.
- Each competing provider involved in the communication and negotiation with health carriers must make an independent decision to accept or reject a specific offer from a health carrier.
- Health carriers communicating or negotiating with the providers' representative must remain free to contract with or offer different contract terms and conditions to individual competing providers.
- The providers' representative must not recommend to providers that providers accept or reject the health carrier's offer. The representative may only deliver the offer to

¹⁴ WAC 246-25-040(3).

¹⁵ WAC 246-25-040(4).

providers and communicate to providers an evaluation of the positive or negative aspects of the offer.

- The providers' representative must not represent more than 30% of the market of practicing providers for the provision of services of a particular provider type or specialty in the service area or proposed service areas of a health carrier with less than 5% of the market, as measured by (1) the number of covered lives as reported by the Insurance Commissioner, or (2) the actual number of consumers of prepaid comprehensive health services.
- The providers' representative must also file specified information with the Department of Health and obtain its approval before engaging in collective negotiations on behalf of competing providers and before reporting the results of its negotiations with a health carrier or giving the providers an evaluation of any offer made by a health carrier.

Under no circumstances are competing providers authorized to act in concert in response to a report issued by the providers' representative related to the representative's discussions or negotiations with health carriers.¹⁶

Can physicians who are involved in the development, delivery, or marketing of health care or health plans obtain an informal opinion as to whether particular conduct is authorized under the antitrust laws, or otherwise petition the Department of Health for approval of conduct that could tend to lessen competition?

Yes.¹⁷ A health carrier, health care facility, health care provider, or other person involved in the development, delivery, or marketing of health care or health plans may request, in writing, that the Department of Health obtain an informal opinion from the attorney general as to whether particular conduct is authorized under the antitrust laws, and may file a written petition with the Department of Health requesting approval of conduct that could tend to lessen competition in the relevant market. Generally, the attorney general will issue an informal opinion within 30 days of receipt of a written request for an opinion or within 30 days of receipt of all additional requested information, unless the time period is extended by the attorney general for good cause.¹⁸ Generally, the Department of Health will issue a written decision approving or denying a petition requesting approval of conduct within 90 days of a properly completed written petition unless the time period is extended by the Department of Health for good cause.¹⁹ The requisite contents of a request for an informal opinion or a petition requesting approval of conduct are established by

¹⁶ WAC 246-25-040(1).

¹⁷ RCW 43.72.310(3).

¹⁸ *Id.*

¹⁹ RCW 43.72.310(3).

regulation.²⁰ Physicians or other health care providers wishing to take advantage of the informal opinion or petition process are well-advised to seek the assistance of experienced legal counsel.

Under Washington law, do “most favored nations clauses” and exclusive dealing clauses in contracts between physicians and managed care organizations pose potential antitrust problems?

Yes. Department of Health rules prohibit the use of “most favored nation” clauses in contracts between a health care provider or facility and a certified health plan.²¹ See
CONTRACTING ISSUES RELATED TO MANAGED CARE ORGANIZATIONS.

What types of penalties may be imposed for antitrust violations?

Violation of the federal antitrust laws is a felony punishable by up to ten years in jail, a fine of up to \$100,000,000 for corporations and up to \$1,000,000 for individuals, or both in the discretion of the court.²²

Violation of the state antitrust laws may result in imposition of a civil penalty of up to \$500,000 for corporations and \$100,000 for individuals.²³

Successful private plaintiffs in antitrust suits under federal or state law may obtain injunctive relief, treble damages, and attorneys’ fees and costs, although under state law trebling of damages is limited to \$25,000.²⁴

²⁰ WAC 246-25-11-, -115.

²¹ WAC 246-25-045 addresses “most favored nations” clauses.

²² 15 U.S.C. § 1.

²³ RCW 19.86.140.

²⁴ RCW 19.86.090.