Antitrust Analysis of Information Exchanges in the Health Care Field and Beyond: The Detroit Nurses Case

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Antitrust Analysis of Information Exchanges Among Competitors

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The views expressed are those of the author, not those of the Federal Trade Commission or of any individual Commissioner.
DOJ/FTC Guidance on Information Exchanges

• Relevant materials include:
  – Antitrust Guidelines for Collaborations Among Competitors
  – Health Care Statements
  – Consent Decrees
  – DOJ Business Review Letters and FTC Advisory Opinions

• These materials address:
  – potential harms and benefits
  – factors to consider when analyzing information exchanges
  – antitrust “safety zones”
Potential Anticompetitive Harms

• Information exchange may facilitate the formation and maintenance of a collusive arrangement by:
  – Providing a **focal point** for coordination
  – Allowing firms to **monitor** their competitors’ adherence to a collusive arrangement
Potential Pro-Competitive Benefits

- Help consumers to make informed purchasing decisions
- Allow firms to benchmark themselves against other firms
- Ensure efficient allocation of scarce resources to those who want or need them most
- Promote better business and investment planning
- Mitigate problems of adverse selection and moral hazard
- Enable synchronization of services and economies of scale
- Support R&D collaborations and other beneficial horizontal arrangements
### Factors Relevant to Assessing Level of Antitrust Concern

<table>
<thead>
<tr>
<th>Less antitrust concern</th>
<th>Factor</th>
<th>More antitrust concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory-compliance and product-safety data</td>
<td><strong>Competitive sensitivity</strong> of information exchanged</td>
<td>Pricing and cost data, output levels and production capacities, business strategies and marketing plans</td>
</tr>
<tr>
<td>Historical sales figures</td>
<td><strong>Currency</strong> of information exchanged</td>
<td>Current or future sales strategies</td>
</tr>
<tr>
<td>Aggregated data that do not allow competitors to identify individual firms</td>
<td><strong>Level of specificity or aggregation</strong></td>
<td>Firm-specific information</td>
</tr>
<tr>
<td>To promote informed consumer decisions, benchmarking, efficient resource allocation</td>
<td><strong>Participants’ intent</strong></td>
<td>To stabilize prices</td>
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- **Competitive sensitivity** of information exchanged
- **Currency** of information exchanged
- **Level of specificity or aggregation**
### Factors Relevant to Assessing Level of Antitrust Concern (cont’d)

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<tr>
<th>Less antitrust concern</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Fragmented industry with many competitors</td>
<td><strong>Industry structure</strong></td>
<td>Concentrated industry with few competitors</td>
</tr>
<tr>
<td>Information already publicly available</td>
<td><strong>Public availability of information exchanged</strong></td>
<td>Information otherwise confidential</td>
</tr>
<tr>
<td>Exchange through an intermediary</td>
<td><strong>Organization and control of information exchange</strong></td>
<td>Direct exchange</td>
</tr>
<tr>
<td>Annual or semiannual exchange</td>
<td><strong>Frequency with which information is exchanged</strong></td>
<td>Weekly or monthly exchange</td>
</tr>
<tr>
<td>Information access restrictions; training and monitoring by antitrust counsel</td>
<td><strong>Safeguards</strong></td>
<td>No safeguards adopted</td>
</tr>
</tbody>
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Antitrust Safety Zones

• Competitor Collaboration Guidelines:
  – Participants collectively account for no more than 20% of each relevant market

• Healthcare Statement No. 6:
  – Managed by third party
  – Based on data more than 3 months old
  – Data aggregated from at least 5 providers
  – No single provider’s data represents more than 25%
  – Aggregation prevents identification of prices charged or compensation paid by any individual provider
Sigma—Challenged Conduct

- DIFRA information exchange “enabl[ed] Sigma, McWane and Star to monitor each others’ adherence to [a] collusive arrangement.”

- McWane’s letter to customers “contained a section that was meaningless to [those customers], but was intended to inform Sigma and Star of the terms on which McWane desired to fix prices.”
Relevance of Health Care Statement Safety Zone in Litigation Context

• “While failing to qualify for the safety zone of the Health Care Guidelines is not in itself a violation . . . , firms that wish to minimize the risk of antitrust scrutiny should consider structuring their collaborations in accordance with the criteria of the safety zone.” [Sigma]

• “[A]ny pro-competitive objectives identified by the Defendant hospitals . . . could just as well have been achieved through exchanges that fell comfortably within the ‘safety zone’ identified in the DOJ/FTC Guidelines. . . . Defendants are notably silent as to how it was necessary to their independent competitive interests to proceed [as they did], rather than confining their exchanges to the ‘safety zone.’” [Cason-Merenda]
Remedies

• In a concentrated industry with a history of collusive conduct, information-exchange participants may need to take added precautions.

• Consent decree requires Sigma to follow precautions beyond Statement No. 6 safety zone:
  – Based on data that are more than 6 months old
  – Based on transactions covering a period of at least 6 months
  – No 3 firms’ data may collectively account for more than 60% of transactions on which information is based
  – Information may be exchanged no more than twice a year
  – Information exchanged must be made publicly available
Conclusions

- Antitrust analysis of information exchanges should consider all relevant factors, including any history of collusive conduct within the industry.
- While safety-zone criteria do not define the limits of exchanges permissible under the antitrust laws, participants should:
  - Consider structuring information exchanges to comply with safety-zone criteria
  - Be prepared to explain why any departures from these criteria are necessary to realizing the pro-competitive benefits of the exchange
Selected Reading Materials

• Consent Decrees

• DOJ Business Review Letters

• FTC Advisory Opinions
Antitrust Analysis of Information Exchanges in the Health Care Field and Beyond

Plaintiff’s Perspective

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- Judge Gerald Rosen

- Defendants moved for summary judgment arguing that Plaintiffs failed to produce direct or circumstantial evidence of any agreement among Detroit-area hospitals to fix RN compensation, and the evidence, to the contrary, reflected independent decision making by each of the hospitals. They further contended that the record failed to establish any anticompetitive effects resulting from the exchange of compensation-related information among Detroit-area hospitals.

- Court granted defendants’ summary judgment motion on the Per Se Claim under § 1 of the Sherman Act;

- Court denied defendants’ summary judgment motion on the rule of reason claim under § 1 of the Sherman Act.
Fleischman v. Albany Medical Center, 728 F.Supp.2d 130 (N.D.N.Y. 2010)

- Judge Thomas McAvoy

- Defendants moved for summary judgment arguing that Plaintiffs failed to produce direct or circumstantial evidence of any agreement among Albany-area hospitals to depress RN wages and exchange compensation information.

- Court denied Defendants’ summary judgment motion on the Per Se Claim under § 1 of the Sherman Act;

- Court denied Defendants’ summary judgment motion on the rule of reason claim under § 1 of the Sherman Act;

- Court denied Defendants' Motion to Exclude Expert Testimony;

- Court granted in part Plaintiffs' Motion to Exclude Portions of Expert Testimony.
## Per Se Claim

### Detroit (Cason-Merenda)
- Plaintiffs’ Evidence in Support of Per Se claim failed to give rise to an inference of Conspiracy stronger than the Inference of Independent Action.
- Contrary to Economic Interest?
- Evidence of Uniformity in Defendants’ Actions?
- Evidence of Uniformity in Defendants' Actions?
- Evidence of Defendants' Exchange of Information Relative to Their Alleged Conspiracy?
- Evidence of Defendants' Common Motive to Conspire?
- Other Forms of Circumstantial Evidence Identified by the Courts as Indicative of an Unlawful Conspiracy
- Plaintiffs' Circumstantial Evidence Viewed in Its Totality

### Albany (Fleischman)
- Economically Plausible?
- Contrary to Economic Interest?
- Structure of the Market Shows Agreement Makes Economic Sense?
- High Degree of Cooperation?
**Per Se Claim**

**Detroit (Cason-Merenda) – Key Considerations**

- Record must give rise to an inference of conspiracy that is stronger than the competing inference of independent action.
- Record failed to establish that Defendants coordinated wage-fixing decisions. The evidence of the lack of uniformity in wage-setting decisions undercut the evidence of Defendants’ willingness to regularly share competitively sensitive wage data.
- “[P]arallel pricing is merely one such form of circumstantial evidence,” citing *Fleischman*. No hierarchy of circumstantial evidence.
- Regular surveys augmented by direct contacts constituted exchanges of information which were not consistent with defendants’ individual pursuit of their own interests.
- Plaintiffs argued that reliance on third party surveys are acceptable and surveys that are conducted with direct contacts fall short of DOJ/FTC safety zone criteria.
- Plaintiffs need not produce evidence of formal agreement among defendants in order to prove conspiracy.
Rule of Reason Claim
Detroit (Cason-Merenda) – Key Considerations

- Record gives rise to issues of fact as to causation that a trier of fact should be permitted to resolve.
- Evidence suggesting wage-related data exchanged among the Defendants was shared through direct contacts or surveys that did not satisfy the DOJ/FTC safety zone criteria, and was relied upon in Defendants’ decisions to reduce elements of their RN compensation packages below the levels that were contemplated before the data became available.
- Plaintiffs need not produce a formal market analysis where they have produced direct proof of anticompetitive effects of the data exchange.
- Specifically, Prof. Ashenfelter’s benchmark analysis of fees paid for agency nurses serves as direct proof of a detrimental impact upon RN wages.
- A detailed relevant market and market power analysis not needed for rule of reason claim. Citing Fleischman.
Per Se Claim
Albany (*Fleischman*) – Key Considerations

- Plaintiffs need not prove parallel pricing in order to prevail on a per-se claim.

- Plaintiffs argued that as opposed to price fixing, parallel pricing would be unexpected because factors in employment decisions permit a conspiracy to operate without coordinated price changes.

- As to whether the evidence excludes the possibility of independent action, plaintiffs provided sufficient evidence of agreement by demonstrating: 1) if defendants set compensation independently, their actions would have been contrary to their economic self interest, 2) with a nursing shortage, it would be against defendants’ interests to exchange wage info since poaching would occur.

- “The fact that but-for a wage agreement, Defendants would be acting against economic self interest is persuasive evidence that Defendants did not act independently.”
Rule of Reason Claim
Albany (Fleischman)– Key Considerations

- Plaintiffs demonstrated actual adverse effects and therefore did not have to have to show market power. Provided sufficient evidence of harm to competition or injury in fact to withstand summary judgment.

- Evidence of suppressed wages and underutilization in conjunction with an explanation of how these information exchanges can lead to softened competition is sufficient to satisfy Plaintiffs’ burden on summary judgment.

- Expert testimony of Prof. Ashenfelter using economic methodology to show that RN wages were depressed during the class period and that nurses were underutilized in the Albany area supported Plaintiffs’ arguments.

- Actual employment data used.

- Expert testimony of Prof. Vistnes to explain the mechanism by which information exchanges lead to suppressed wages through the economic theory of softened competition supported Plaintiffs’ arguments.

- A detailed relevant market and market power analysis not needed for rule of reason claim.
Lessons from the Nurses Case: A Defendant’s Perspective

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The Nub of the Problem (in the Judge’s Eye)

• “On Demand” exchange of non-Safety Zone Information
  – Disaggregated or ineffectively aggregated surveys
  – Future plans surveys
  – Ad hoc informal exchanges
  – Professional organization exchanges
  – Compensation philosophies and systems exchanges

• Perceived lack of a unilateral business reason
Per Se “Very Close Question”

Despite:

• No direct evidence of wage-fixing
• No parallel outcomes
• Each hospital used different information at different times in different ways
• Hospitals had materially different compensation systems
• Complex compensation systems (numerous material components beyond base wage)
• Unconcentrated Market
1. Parallel conduct not required for a *per se* wage fixing conspiracy

2. Desire for more current and detailed information is not an independent business interest

3. Quid pro quo (must give to get) sharing of information inconsistent with independent interests

4. Expert evidence linking exchanges to wage suppression not required

5. “Anecdotal” instances of wage decisions influenced by survey data are sufficient to establish causation

6. *Per se* was “very close question”
Lessons Learned

• HR/Comp is a significant source of antitrust risk

• Non-safety zone surveys are inherently dangerous; Guidelines language that non-safety zone ≠ unlawful provides little practical protection

• Complexity/uncertainty of effect and competitive consequences (antitrust injury) of information sharing increases risk

• Business context, such as unionization targeting, increases risk of suit
Lessons Learned

• Need focused compliance policy

  – Consider prohibiting participation in non-safety zone surveys absent substantial business reason with proper authorization

  – Consider limiting participation to a single high quality, sponsored survey (don’t respond to anyone who sends you a survey)

    • Trade association is appropriate survey intermediary, as long as members d/n agree on whether and how to use survey info

  – Reinforce that policy applies to information exchanges, not just surveys

    • “Information exchange” is an antitrust term of art likely used or understood in business
Antitrust Analysis of Information Exchanges

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United Airlines
Information Exchange
Practical considerations

- Quality of information issues
  - Compare *Todd v. Exxon*
  - Compare DOT data filed by airlines

- Purpose of information exchange
  - External hiring practices or internal salary management
  - Hiring program, Salary program or ad hoc need
  - Availability of external benchmarks
  - How relevant is the data to the business of the enterprise
Information Exchange
Procedural Considerations

- **U.S. v. U.S. Gypsum** – (affirming criminal conviction after jury trial)
- **Todd v. Exxon** – (reversing 12(b)(6) dismissal)
- **Smith Wholesale v. R.J. Reynolds** – Rule 56 (summary judgment disfavored in 6th Cir.)
- **Riverview Investments v. Ottawa Community Improvement** – Rule 50 (affirming j.n.o.v.)
- **Re/Max International v. Realty One** – Rule 56 (reversing summary judgment)
- **In re Northwest Airlines** – Rule 56 (denying summary judgment)