



# *Antitrust Basics for American Academy of Audiology*

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# Agenda

- Overview of the applicable antitrust laws
- Specific application to AAA
  - Managed care reimbursement concerns
    - » Dealing with payers
    - » Communicating with members
  - Member information collection and exchange
  - Working with other stakeholders
- Why compliance is important
- Antitrust Do's and Don'ts

# The Antitrust Statutes

- Sherman Act
  - Section 1
  - Section 2
- FTC Act Section 5
- State law

# Sherman Act Section 1

- Prohibits agreements among private, competing businesses, such as audiologists in separate practices, that unreasonably restrain competition
  - The acts of member-controlled trade associations may constitute, or facilitate, agreements among competitors
    - » Not all agreements restrain competition
    - » Not all competitive restraints are unreasonable

# The Standards for Legal Analysis

## ■ Per Se

- Conduct automatically illegal
  - » Regardless of reason or potential justification

## ■ Rule of Reason

- Full balancing of anticompetitive effects and procompetitive efficiencies
- Complicated, very fact-specific analysis

## ■ Quick Look

- Q1: Is the conduct of a type that is inherently suspect?
  - » Q2a: If not, then rule of reason applies.
  - » Q2b: If so, are there plausible and cognizable justifications?
    - Q3a: If not, then conduct illegal.
    - Q3b: If so, then rule of reason applies.

# Per Se Category Offenses

## ■ Price-fixing

- Agreements on minimum/maximum price, discounts, terms of credit, terms of sale, margins, or costs

## ■ Market Allocation

- Agreements on sales or service area

## ■ Concerted refusals to deal

- Agreements as to when purchases/sales will be made
- Agreements as to who will be allowed in a group

## ■ Boycotts

- Pressuring others not to deal with competitors, payers, suppliers, or customers

# RECAP:

## Components of a Section 1 Violation

- Two or more parties
- Agreement
- Unreasonable restraint on competition
- Anticompetitive Effects
  - Direct
  - Circumstantial
    - » Market power in a relevant market
- Procompetitive efficiencies outweighed

# Sherman Act Section 2

## ■ Prohibits

### – Monopolization

- » Monopoly power (requires large market share >50%)
- » Unilateral conduct
  - Actions to acquire monopoly power
  - Actions to entrench market position (predatory conduct)
  - Actions to enhance control of market (anticompetitive conduct)

### – Attempted monopolization

- » Predatory or anticompetitive conduct by a single party
- » Specific intent to monopolize
- » Dangerous likelihood of success

### – Agreements to monopolize

- » Can also be Section 1 violation

## ■ Rule of reason analysis



# Section 5 of the FTC Act

- Prohibits unfair methods of competition
- Interpreted to cover all acts prohibited by the Sherman Act, but may be broader
- Violations analyzed the same as they would be under the Sherman Act
- Only FTC has jurisdiction under this statute
  - Can enforce statute through administrative litigation or in federal courts
- Civil penalties, but can refer matters to Department of Justice Antitrust Division for criminal prosecution under the Sherman Act

# Antitrust Law in the States

- Most states have antitrust statutes that cover the same conduct as the federal statutes
- State attorneys general have power to enforce state and federal antitrust laws
  - Some are quite active enforcing the antitrust statutes in the health care sector
  - Often seek financial redress

# Application of Antitrust Laws to AAA

- Members may be competitors
- Potential to adversely affect competition
  - Locally among audiologists as service providers
  - Nationally among audiologists as purchasers and sellers
- Potential procompetitive benefits of operation
  - Provide education to members to improve their delivery of services
  - Provide information to members to increase competition
- AAA may be liable for acts of its members, even if:
  - AAA was unaware of the activity
  - AAA did not approve the activity
  - Members were acting in their own interest and against the interests of AAA and other members

# Coding and Reimbursement Committee Charges

- Identify and monitor coding and reimbursement issues that impact upon the profession of audiology
- Provide input regarding coding and reimbursement regulatory issues and develop strategies and recommendations to effect change
- Collaborate with other industry stakeholders on coding, coverage and payment policy issues to influence desired outcomes
- Communicate coding and reimbursement related information to members
- Develop and provide coding and reimbursement related resources for members

# Cautions for Coding and Reimbursement Committee Meetings

- Discussion of prices or supply costs may be interpreted as price fixing
  - Given the broad definition of “price,” its important to speak generally, rather than specifically
- Committee members should have a basic understanding of antitrust law and, when questions about legality of a discussion arise, shut down the discussion or seek guidance from counsel
- Agenda for meetings should be prepared and sent to members prior to meetings to prevent questionable discussion topics from being raised during meetings
  - If a “risky” topic needs to be discussed, it may be good to have legal counsel participate in the meeting
- Minutes should be kept for all meetings, and minutes should accurately reflect the discussion at the meetings

# Managed care reimbursement concerns: Dealing with Payers

- Provision of non-fee-related information (e.g., data on quality and efficiency) by competitors to a purchaser does not raise antitrust concerns unless there is an anticompetitive purpose
- Education of payers and advocacy for all members are fine
  - BUT there is a fine line between advocacy and negotiation
    - » Should always make clear to payer what Academy's purpose in speaking with the payer is
    - » If a conversation with a payer makes you uncomfortable, end it
- Coercive behavior is never okay
  - Coercion includes: threatened terminations, refusals to contract, and public disparagement to get concessions from payers
- Committee should not develop policies regarding:
  - What payers services or goods should or should not pay for
  - How payers should reimburse members

# Managed care reimbursement concerns: Communicating with Members

- Be careful about how your information is conveyed to members
  - Do not facilitate agreements among your members
    - » Make communications clearly educational, rather than requiring or advocating that members adopt a particular position for buying or selling their goods or services or for dealing with payers
  - Make clear that each member (or his/her business) must individually decide what to purchase and sell, how to price individual goods and services, and whether to sign insurance contracts
  - Provide objective information
    - » Adjectives can be problematic (e.g., “ill-conceived,” “fair” or “appropriate” reimbursement)

# Member Information Collection and Exchange

- FTC/DOJ Statements provide guidance
  - Collection of non-fee-related information (e.g., quality and efficiency data) generally okay
  - Collection of price information can raise concerns
    - » Safe harbor:
      - Collection managed by third party (like AAA)
      - If information collected is to be shared among providers:
        - Data collected must be three months old
        - Must collect data from at least 5 providers for each disseminated statistic
        - No individual provider's data may represent more than 25 percent on a weighted basis of the statistic
        - Data must be aggregated so an individual's data cannot be identified



# Working with Other Stakeholders

- Be clear about the purpose for which you are working together
  - Education, advocacy, lobbying are all okay
  - Aggregating market power and engaging in anticompetitive conduct is bad
- If something will be put in writing, make sure you have some control over it
  - If a writing raises antitrust concerns, seek legal counsel
- If a discussion raises antitrust concerns, speak out and put a stop to it
  - Seek legal counsel and suggest to others that they do the same before discussions continue

# Importance of Compliance

- Severe penalties for Sherman Act violations
  - Individuals
    - » Criminal violation is a felony
      - Up to \$1 million fine, 10 years imprisonment, or both per violation
    - » Civil violation may restrict future employment
  - Businesses
    - » Up to \$100 million fine per criminal violation
    - » Courts can impose restrictions on future business
    - » Private suits can obtain treble damages and attorney fees
- Lawsuits and government investigations, even if without merit, are costly to defend

# Antitrust Do's

- Know the purpose of all meetings with competitors.
- Ask for an agenda if you do not receive one. If an agenda item raises antitrust concerns, voice those concerns.
- Request that counsel, with antitrust training, be present at any discussion that involves potentially-sensitive competitive information.
- Be careful what you discuss during informal contacts with competitors.
- Remember that anything you write, including e-mail and instant messages, may be closely scrutinized by antitrust enforcers.
- Seek legal advice from your counsel or AAA's if you have any questions about antitrust issues.

# Antitrust **DON'TS**

- Discuss, or agree with, competing providers (“competitors”) as to prices (contract rates, service charges, or merchandise prices), pricing practices, or pricing strategies (including methods, timing, or implementation of price changes), or other price-related or competitively sensitive terms.
- Discuss or agree with competitors as to whether you will accept or reject specific reimbursement rates or contract provisions from insurers.
- Discuss or agree with competitors whether to negotiate or contract with certain payers.
- Discuss or agree with competitors not to purchase from or order through certain suppliers.

# Resources - Formal Agency Guidance

- DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care

<http://www.ftc.gov/reports/hlth3s.htm>

- Health Care Report - “Improving Health Care: A Dose of Competition”

<http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>