MYTH: Health care providers in a given geographic market may share pricing information without fear of antitrust liability.

FACT: Providers must be very careful about sharing pricing information to avoid antitrust scrutiny.

In the current health care environment, different levels of health information exchange are taking place, sometimes including the exchange of pricing information. These activities can range from active efforts to gather quality and cost information from participants to the use of health information to design new ways of paying for certain types of health care in order to achieve certain outcomes. What antitrust liability, if any, arises from providers sharing their pricing information?

Section 1 of the Sherman Antitrust Act prohibits those restraints of trade that unreasonably restrain competition, such as collusion between competitors to fix prices in a given market. But the sharing of information about price and quality in and of itself is not necessarily a problem; the effect of such sharing on the market is the key question.

The courts generally use one of two methods to make this determination, depending on the nature of the issue. Certain categories of restraints, such as horizontal price-fixing, group boycotts, bid rigging, and market-allocation agreements are considered *per se* illegal. That means that these activities are presumed to restrain competition unreasonably even without a study of the market in which they occurred, or an analysis of their actual effect on competition, or their purpose. Examples of agreements that have been determined to be price-fixing arrangements include: establishing minimum or maximum prices, creating pressure to increase prices, stabilizing prices, interfering with a competitor's freedom to make price changes independently, and establishing uniform terms of sale, uniform discount policies, or otherwise establishing an agreed-upon approach to an underlying element of the price charged.

However, most categories of restraints of trade are assessed under the rule of reason, which requires an analysis of the challenged restraint's effect on competition in the relevant market. The rule of reason is applied in situations where the economic impact of certain practices is not immediately obvious. Thus, antitrust law prohibits conduct among competitors that seeks to restrain trade, but it does not proscribe all interactions between competitors in a given market and will allow sharing of information that does not have an anticompetitive effect in the market. For example, systems that share information to promote value-based purchasing through public reporting of quality and cost information are likely to be procompetitive, rather than anticompetitive, as long as the participants do not collectively set uniform prices, fees, bonus amounts, or other competitively sensitive terms. On the other hand, a system that allows competing providers to share pricing information among themselves but not publicly, and does not also include information

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about the value of services provided for consumers (such as quality information), is likely to be anticompetitive and may violate antitrust law.

For More Information:

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