

# Statutes

- Sherman Act
  - § 1: Prohibits contracts, combinations or conspiracies resulting in an unreasonable restraint on trade
  - § 2: Prohibits monopolistic behavior/attempts to monopolize
- Clayton Act § 7
  - Prohibits M&As where effect is to substantially lessen competition
- State antitrust laws

# Competitive Effects

- Procompetitive Effects
  - Efficiency gains/lower prices
  - Innovation/new products or services
  - Improved quality
- Anticompetitive Effects
  - Lower efficiency/Higer prices
  - Less innovation/stifles introduction new products or services
  - Lower quality
  - *Factors:*
    - Fewer producers/sellers
    - Competitors dividing-up the market
    - Barriers to new producers entering market
    - Agreement on price
    - Joint negotiations with buyers

# MI State Medical Society

- Activity: Threatened group boycott
- Justifications for actions:
  - 1) No effect on fees
  - 2) Ensure MDs treated fairly given payors' bargaining power
  - 3) Counteracting BCBS's violation state charter/law
  - 4) Correct abuses of Medicaid system and impact on patients

# Sherman Act: § 1

## 1) *“Contract, combinations or conspiracies”*

- No require actual agreement
- Sufficient if conscious commitment to common scheme/unspoken agreement (*MI State Medical Soc’y*)

## 2) *Is constraint unreasonable?*

- *Per Se* illegal: anticompetitive effects highly likely and procompetitive effect highly unlikely
- Rule of Reason: weigh anticompetitive and procompetitive effects
  - Unreasonable if anticompetitive effects > procompetitive effects
  - Focus on effect on **competition** (*MI State Medical Soc’y*)

# Physician Networks: Statement 8

- Safe Harbor #1: Exclusive MD network
  - No more than 20% MDs in each MD specialty in geographic market
    - If <5 MDs in specialty in relevant market, include only 1 on non-exclusive basis
  - Share substantial financial risk
- Safe Harbor #2: Non-exclusive MD network
  - No more than 30% MDs in each MD specialty in geographic market
    - If <4 MDs in specialty in relevant market, include only 1 on non-exclusive basis
  - Share substantial financial risk

# Physician Networks: Rule of Reason Analysis

## *1) Does JV have a procompetitive purpose?*

- E.g., efficiencies, innovation, new or improved service
- If no → unreasonable restraint on trade

## *2) Is restraint on trade ancillary to JV's procompetitive goals?*

- Step 1: Identify restraints on trade
- Step 2: Is each restraint reasonably necessary to achieving procompetitive goals?
- Step 3: Does restraint go beyond what is reasonably necessary to achieve procompetitive goals?

## *3) Full-blown rule of reason analysis: weigh procompetitive and anticompetitive effects*

- Anticompetitive query: JV's market power
- Procompetitive query:
  - Potential for efficiencies/innovation/new, improved, or expanded services
  - Key consideration: extent of financial and clinical integration

# Market Power

- Relevant to evaluation of anticompetitive effects
  - i.e., how competitive is the market
- Market share
  - Define product market
    - Statement 8 safe harbors: product market = specialty
    - Rule of reason query: Do consumers view other types of providers as substitutes?
  - Define geographic market
    - Query: Are consumers willing to travel to providers located in other areas?
- Other considerations
  - Exclusive vs. non-exclusive network
  - Barriers to entry
  - Ease with which consumers can switch

# Multiprovider Networks: Statement 9

- 1) Does JV have a procompetitive purpose?
- 2) Is restraint on trade ancillary to JV's procompetitive goals?
- 3) Full-blown rule of reason analysis: weigh procompetitive and anticompetitive effects
  - Evaluate anticompetitive effects
    - Step 1: Consider horizontal effects
      - i.e., competitive effects of competitors participating in JV
    - Step 2: Consider vertical effects
      - i.e., using market power in one market to limit competition in another
  - Evaluate procompetitive effects