

Spotting Antitrust Issues in Unexpected Places

Association of Corporate Counsel

Matt Sawchak, Greg Skidmore and
Megan Haynes

January 2021

Antitrust Laws

- Intended to promote free and open competition in the market.
- Enforced by:
 - Government regulators (state and federal)
 - Private antitrust litigation
- Violations can result in criminal prosecution, monetary fines and civil (treble) damages.

Spotting Antitrust Issues

- Competitor interactions
- Competition among employers
- Selling practices



Antitrust Issues when Meeting with Competitors

Interacting with Competitors

- Trade associations
- Lobbying activities
- Joint ventures
- Negotiations
- Social interactions



Meetings with Competitors

- Not inherently unlawful.
- Can present an opportunity for an antitrust violation to occur.
- Must be mindful of the appearance of unlawful coordination.



Best Practices – Do's

Guidelines and training:

- Company antitrust policy
- Company training
- Trade association antitrust policy



Best Practices – Do's



At the meeting:

- Have an agenda and stick to it.
- Involve counsel when needed.
- Make a record.

Best Practices – Don'ts



- Don't discuss pricing.
- Don't discuss allocation of markets or customers.
- Don't discuss future commercial or strategic plans.
- Don't discuss dealing or refusing to deal with certain customers.

*If the discussion turns to an inappropriate topic,
leave in a conspicuous fashion.*

Best Practices – Caution

- Dinners
- Social events
- Golf outings



Antitrust risks can be greater in social and informal settings.

Generic Drug Antitrust Lawsuit

- May 2019: 20 generic drug manufacturers and 15 individuals sued by state attorneys general for conspiring to fix prices.
- Complaint focused on “cozy nature” of industry and social interactions among executives.
- “Opportunities for collusion” at trade shows, customer conferences, dinners, golf outings, etc.

Best Practices

- Educate your internal clients – best way to protect them and the company.
- Avoid situations that can be misconstrued after the fact.
- Think about how something will look to a neutral observer.
- What precautions were taken?

Antitrust Issues with Competing Employers

Competition Among Employers

- Employers compete to hire and retain employees.
- The DOJ and the FTC are on alert for the following anticompetitive conduct by employers:
 - Wage-fixing
 - No-poach and non-solicit agreements
 - Exchange of competitively sensitive information

Wage Fixing

Agreements not to compete on terms of compensation are illegal per se.

- Agreements do not need to be written or formal.
- Employers may be competitors even if they do not make the same products or provide the same services.
- Franchisors and franchisees should not automatically be considered a single entity.



Non-Solicitation and No-Poach Agreements

- Agreements not to solicit employees of a competitor are illegal if they are not necessary for a larger legitimate collaboration.
- Non-solicitation agreements can be lawful if:
 - Reasonably necessary for a legitimate business collaboration,
 - Supported by a pro-competitive justification, and
 - Limited in geography, scope and duration.



Sharing of Competitively Sensitive Information

- Exchange of information about terms of employment can violate antitrust laws.
- Parties to a transaction may only exchange sensitive information with appropriate precautions.
- Information exchanges may also be lawful if:
 - A neutral third party manages the exchange,
 - The exchange includes relatively old information, and
 - The information is sufficiently aggregated.

CONFIDENTIAL
For Authorized Personnel Only

United States of America v. Surgical Care Affiliates LLC

- Second of two indictments against health care companies for employer collusion in the past two months.
- First criminal indictment targeting non-solicitation agreements.
- Alleges SCA entered into unlawful no-poach agreements with two other health care companies to suppress competition for hiring senior-level employees.

Seaman v. Duke University, et al.

- Private class-action lawsuit with DOJ intervention.
- Involved allegations that UNC and Duke entered into unlawful no-poach agreements for medical faculty.
- Seaman agreed to settle with UNC in 2017 in exchange for assistance with the case against Duke and a prohibition on no-poach agreements.
- Duke settled in 2019 for \$54.5 million and other antitrust compliance monitoring requirements.

Seaman v. Duke University, et al.

Dear Danielle,

Thank you for your continued interest in our department. I remember you well and certainly enjoyed your previous visit with us.

I agree that you would be a great fit for our cardiothoracic imaging division. Unfortunately, **I just received confirmation today from the Dean's office that lateral moves of faculty between Duke and UNC are not permitted. There is reasoning for this "guideline" which was agreed upon between the deans of UNC and Duke a few years back.** I hope you understand.

Please be assured that your inquiry into our faculty position will continue to be kept in strict confidence by me.

Congratulations on your recent Junior Faculty Teaching Award. I wish you much continued success in your academic career.

Dear Danielle,

...

In answer to your question, **the "guideline" was generated in response to an attempted recruitment by Duke a couple of years ago of the entire UNC bone marrow transplant team; UNC had to generate a large retention package to keep the team intact.**

Best Practices

- Do not agree with other employers to take common action of any kind.
- Do not share salary, wage or benefit information with other employers.
- Be vigilant at industry conferences or other events where other companies are present.
- Seek guidance from counsel if:
 - You are planning to share competitively sensitive information or enter into a non-solicitation agreement in connection with a transaction.
 - You receive another company's competitively sensitive information.

Antitrust Issues with Downstream Players

Relationships with Resellers and Other Downstream Players

Termination/downgrades can lead to messy claims:

- Resale price maintenance
- Exclusive dealing
- Breach of contract
- State-law “unfair trade practices”

Relationships with Resellers and Other Downstream Players

Review terminations and other cutbacks for risks:

- Is the problem with the dealer something competitively sensitive, like the dealer's prices or what else the dealer sells?
- What do the emails look like?
- Will the dealer be stuck with sunk costs?
- Is the dealer in a state with a "good cause" statute, such as Minnesota, Wisconsin or New Hampshire?

Tying

- Basic idea: To buy what you really want from us (X), you have to buy something else (Y) too.
- Risk assessment:
 - Are X and Y commercially separate?
 - Do you have some market power in X?
 - Why the tie?
 - Who is harmed by the tie?

Package Pricing: Bundling

- Computer alone costs \$450.
- Printer alone costs \$250.
- Computer plus printer together cost \$500.
- Consider the reaction of a competing seller of printers.



Package Pricing: Risk Assessment

- Are the computer and the printer commercially separate?
- Will customers feel that they have no real choice but to take the printer?
- For customers, what is the apparent net price of the printer in the package? Is that net price impossible for competing sellers to match?
 - That does not equal a violation, but it means that the deal needs careful analysis.



Matt Sawchak

919.328.8801

MSawchak@robinsonbradshaw.com

Greg Skidmore

704.377.8144

GSkidmore@robinsonbradshaw.com



Megan Haynes

704.377.8379

MHaynes@robinsonbradshaw.com