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FTC Sues e-Prescriptions Company in Rare Monopolization Case

COMMENTARY

MAY 2019

FTC Sues e-Prescriptions Company in Rare Monopolization Case

ANTITRUST LAW

IN SHORT

The Situation: The Federal Trade Commission ("FTC") recently filed a rare monopolization case, alleging that a health information technology company illegally monopolized two e–prescribing markets.

The Impact: The FTC continues to aggressively enforce the antitrust laws in the health care industry. Contracts that the FTC believes unfairly lock in customers and harm competitors are likely to receive scrutiny.

Looking Ahead: The outcome of this case may help clarify when conduct such as exclusivity, loyalty discounts, or non-compete clauses violate the antitrust laws. This case also signals the FTC's interest in developing law in two-sided markets following the Supreme Court's *American Express* decision in which the Court held that proof of harm in both sides of a market must be shown.

Background

The FTC's complaint alleges that Surescripts violated Section 2 of the Sherman Act, which prohibits monopolization or attempted monopolization through anticompetitive conduct. According to the complaint, Surescripts deployed exclusivity clauses, bundled discounts, and non-compete clauses to monopolize two "e–prescribing" markets: (i) routing of e–prescriptions to pharmacies, and (ii) determining patients' eligibility and benefits for prescription coverage. "E-prescription routing" involves technology that enables prescribers to send electronic prescriptions directly to pharmacies. "Determining eligibility" is an electronic service that transmits patient formulary and benefit information to a prescriber to ascertain whether a patient is eligible for prescription coverage.

The FTC alleges that Surescripts raised customers' costs to use other platforms and excluded competitors from network markets in response to competitive pressures. According to the FTC, Surescripts believed competition would drop prices to unprofitable levels, threaten its financial viability, and endanger its 95 percent market share. Surescripts offered customers deep discounts and rebates in exchange for exclusively using Surescripts' networks. Customers that also used a competing platform had to pay Surescripts the difference between the loyal and non-loyal price for the customer's entire historical transaction volume over the contract term. According to the complaint, customers had little choice but loyalty to Surescripts' "must have network," and competitors had no meaningful ability to enter or expand, notwithstanding attractive market conditions. Surescripts also allegedly offered incentives to a key customer that could make-or-break Surescripts' plan, which Surescripts' documents insinuated was a "bribe."

Surescripts allegedly implemented a similar scheme to capture indirect customers. According to the FTC, Surescripts provided large discounts (called "incentive payments") to RelayHealth, a McKesson subsidiary that contracted with Surescripts to resell the routing transaction to certain customers. The discounts were proportionate to the number of retail customers (pharmacies and pharmacy technology vendors) with whom RelayHealth contracted for exclusive routing through the Surescripts network. Surescripts also allegedly recognized the "significant threat" that RelayHealth posed, because it could "capture 15-20% of transaction volume" by connecting McKesson's current pharmacy and prescriber products. Surescripts secured a six-

year non-compete agreement that allegedly prevented RelayHealth from competing for routing customers.

In the FTC's view, Surescripts' conduct increased prices in both the routing and eligibility markets, stymied innovation, limited choice, foreclosed entry, and reduced quality. The FTC seeks monetary relief in addition to a permanent injunction that would prohibit the conduct.

While the FTC has directed much of its recent health care enforcement at pharmaceutical companies and providers, the *Surescripts* case puts prescription drug networks and pharmaceutical dispensing companies into the spotlight.

Surescripts' Response

Surescripts announced that it will remove the loyalty clauses from its contracts to "address[] one of the FTC's chief concerns while reflecting the current dynamics of the healthcare industry and the state of electronic prescribing today."

As noted in our March 2019 Commentary, the Third Circuit held that when anticompetitive conduct has ended, the FTC cannot satisfy the preliminary injunction standard of FTC Act Section 13(b), which authorizes the FTC to seek preliminary injunctive relief if the FTC has reason to believe that any person or corporation "is violating, or is about to violate" the FTC Act. Therefore, Surescripts' response might limit its financial exposure. However, the FTC has argued that Section 13(b) separately authorizes the FTC to seek a permanent injunction "in proper cases" (as it has done in this case), and that this provision is independent of the requirement that the FTC establish that a defendant "is violating, or is about to violate" the law.

Impact

Monopolization cases are rare, and the *Surescripts* case reinforces the FTC's focus on the health care industry. While the FTC has directed much of its recent health care enforcement at pharmaceutical companies and providers (DOJ typically handles health insurance matters), this case puts prescription drug networks and pharmaceutical dispensing companies into the spotlight for the first time since the introduction of e-prescribing. Notably, despite recent divisions among the FTC Commissioners in some cases, the Commission voted unanimously to issue the complaint.

This case also will be one of the first to address two-sided markets since the U.S. Supreme Court's 2018 *American Express* decision in which the Court concluded that plaintiffs need to show harm to both sides of a two-sided market. In *Surescripts*, routing and eligibility each require a two-sided network, and the FTC alleged that the two-sided markets in *Surescripts* were an entry barrier that reinforced Surescripts' market position.

Cases involving nascent technologies like those in *Surescripts* often warrant a cautious approach because intervention in markets that are developing or not well understood may stifle innovation. However, the FTC believes that Surescripts' loyalty provisions, exclusivity arrangements, and non-compete clauses maintained and contributed to its "dominant position" over many years. Health care companies with significant market share, particularly those that provide emerging network, data, communications, and connectivity services to health care patients and providers, should be cautious about strategies comparable to those of Surescripts.

THREE KEY TAKEAWAYS

1. This case highlights the FTC's continued focus on competitive conduct in the health care industry.
2. Scrutiny from the antitrust authorities is more likely

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for companies with a significant market position that have contracts that lock in customers or make it more difficult for competitors to gain a foothold.

3. Companies operating in two-sided markets are likely to see an uptick in antitrust enforcement as the antitrust agencies probe the bounds of the *American Express* case.

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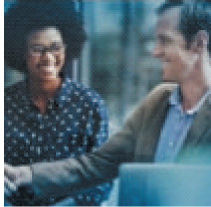

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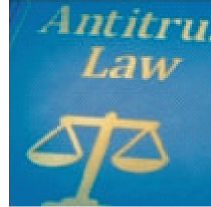

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