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FTC Files First Monopoly Case in Two Years Against Health Information Technology Company Surescripts

Jeffrey May (Wolters Kluwer) · Tuesday, April 30th, 2019

After facing a significant loss in its last monopolization action filed just over two years ago, the Federal Trade Commission last week filed a new monopolization case against a provider of e-prescribing solutions for purportedly using exclusive long-term contracts with customers and other tactics to suppress competition from rivals.

The FTC announced on April 24 that it filed a complaint in the federal district court in Washington, D.C. against Surescripts, LLC for allegedly engaging in a long-running anticompetitive scheme to maintain its monopolies over two separate, complementary markets: electronic prescription routing and eligibility, which are often collectively referred to as "e-prescribing." The agency seeks injunctive relief to bar the challenged practices and other equitable relief, including monetary relief, to prevent unfair methods of competition.

The FTC alleges that Surescripts maintains at least a 95 percent share (by transaction volume) in each of the two alleged relevant markets: routing and eligibility. As explained in the FTC's complaint, routing is the transmission of prescription and prescription-related information from a prescriber (via the prescriber's electronic health record (EHR) system) to a pharmacy. Eligibility is the transmission of a patient's formulary and benefit information from a payer (usually the patient's pharmacy benefit manager or PBM) to a prescriber's EHR.

Surescripts has allegedly taken steps to protect and maintain its monopolies and to prevent meaningful competition in the markets for routing or eligibility. Surescripts changed its pricing policies to require long-term exclusivity from nearly all of its routing and eligibility customers, according to the agency. Its pricing purportedly ensured that customers would pay a higher price on all of Surescripts's transactions unless they were "loyal" to Surescripts, i.e., used Surescripts exclusively. The loyalty provisions in contracts with customers on both sides of the routing and eligibility markets conditioned discounts or payments on actual or de facto exclusivity.

In addition, the FTC contended that Surescripts used threats to prevent Allscripts, a large EHR customer of Surescripts, from also working with Emdeon (n/k/a eRx Network), which apparently offered lower prices and greater innovation. Emdeon attempted unsuccessfully to expand its presence in the routing and eligibility markets. The complaint quotes a Surescripts vice president gloating about how Surescripts's loyalty contracts scheme excluded competitor Emdeon: "It['\]s nice when a plan comes together."

The FTC also outlined alleged efforts to address competitive threats raised by RelayHealth, a subsidiary of McKesson Corporation, in routing. In order to eliminate this competitive risk, Surescripts entered into an agreement that prohibited RelayHealth from competing in the routing market for six years, it was alleged.

“Chicken-and-egg” problem/two-sided networks. The complaint also discussed the so-called “chicken-and-egg” problem that exists in the industry. According to the agency, providing routing requires building a two-sided network (or platform) linking EHRs to pharmacies and providing eligibility requires building a two-sided network (or platform) linking EHRs to PBMs. For many two-sided networks, customers on one side of the network will not join the network unless they are confident that they will be able to access enough customers on the other side and thereby derive enough value from using the network. Neither side will join unless they believe the other side will. This gives rise to what economists refer to as the “chicken-and-egg problem,” the FTC explained. This chicken-and-egg problem serves as a barrier to entry in each of the markets for routing and eligibility. According to the FTC, Superscripts’s tactics significantly elevated the critical mass a Surescripts competitor would need to become a viable network in either routing or eligibility.

Monopoly claims against Shire ViroPharma. In February 2017, the FTC filed a monopolization complaint in the federal district court in Wilmington, Delaware alleging that Shire ViroPharma Inc. violated antitrust laws by abusing the U.S. Food and Drug Administration’s citizen petition process to maintain its monopoly on Vancocin Capsules, a drug used to treat a potentially life-threatening gastrointestinal infection. The agency sought a permanent injunction and equitable monetary relief under Section 13(b) of the FTC Act. The Third Circuit recently ruled that the agency was not entitled to a permanent injunction and equitable monetary relief under Section 13(b) of the FTC Act against Shire more than five years after the drug company filed its petitions. The court upheld dismissal of the suit and rejected the FTC’s “expansive” view of Sec. 13(b).

The FTC’s authority to seek relief in federal court under Sec. 13(b) will likely again be in dispute in this latest monopoly action against Surescripts.

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