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AN OVERVIEW OF ANTITRUST LAWS AFFECTING PHYSICIANS

From a legal perspective, the sale of medical services by physicians is considered to be the same as the sale of any other service or product in the marketplace. All of the factors that affect other businesses are involved: seller-buyer relationships, supply and demand economics, bargaining, volume discounts, competition, and rivalry. In the economy of the United States, the linchpin of these market factors is competition. It is believed that a reduction in competition will give rise to monopolies and other anticompetitive entities that can erode the natural ebb and flow of market forces and may, among other things, impose high prices and low quality on consumers.

It was because of the anticonsumer effects of monopolization during the late nineteenth century that legislators originally enacted the Sherman Antitrust Act (1890) to preserve competition. The Clayton Act was passed in 1914 to give Congress more ability to enforce the Sherman Act. Over the past forty years it seems that physicians have been affected more by these laws, originally passed to curb the activities of the early industrialists, than any other professionals in the country. The peer review process, hospital privileges, a hospital's exclusive contract with a single group of physicians, joint pricing, managed care contracts, and practice mergers are some of the areas to which antitrust laws may apply.

Different antitrust laws address the varieties of anticompetitive conduct. The most common of the laws that affect physicians is the grandfather of antitrust law, the Sherman Act. The Sherman Act has two sections: Section 1, which prohibits conspiracies to reduce competition and Section 2, which prohibits monopolization and attempted monopolization by one or more parties.

CONSPIRACIES TO REDUCE COMPETITION
Sherman Act, Section 1

A conspiracy is defined by law as a concerted action by two or more persons to commit an unlawful act, or a lawful act that becomes unlawful if committed by concerted action. For example, the activities listed below are not unlawful if committed by an individual physician, but become illegal when two or more physicians agree to such conduct. It should be noted that some of the violations under Section 1, such as price-fixing can be prosecuted criminally.

Price-Fixing
Any discussion between two or more independent physicians about fee-related matters may be labeled as price-fixing and as such can be criminally prosecuted. Price-fixing may include, for example, two or more physicians collectively setting minimum or maximum fees and copayments for patients covered by a health plan. Individual practitioners or corporations, however, are generally free to set any charges they wish when acting alone. It should be noted that joint pricing by

independent physicians is allowed under certain conditions: if the physicians are part of a single corporation, members of an Independent Practice Association (IPA), or Physician-Hospital Organization (PHO); and are in compliance with Department of Justice guidelines.

Market Allocation

It is considered illegal if individual physicians agree to divide up therapeutic or geographic territory, i.e., if the psychiatrists in a town agree in advance that Dr. Brown will see all the bipolar patients, Dr. Green will see all borderline patients, and that Dr. Black will see all patients with eating disorders; or if they agree that Dr. Brown will see all patients residing in the northeast quadrant of the town, Dr. Green patients from the northwest, and Dr. Black patients from the south part of town. However, if these three psychiatrists enter into a joint venture, they can then allocate the market as they wish to, so long as they are not perceived as having undue market power.

Concerted Boycott

While a single business (or independent physician) is free to refuse to deal with anyone it chooses, if two or more competitors agree to boycott a third party, that may be considered a concerted boycott, and hence would be illegal under the Sherman Act. For physicians this means that although an individual doctor is free to accept or reject the fees and other terms offered by a managed care organization, if two or more doctors get together and decide they will only deal with an MCO if certain terms are met, that may be considered an illegal boycott.

Exclusive Dealings

Doctors are often denied privileges by a hospital because it has an exclusive contract with another physician or group of physicians. In the antitrust cases filed by physicians, based on this section of the Sherman Act, alleging that other physicians and hospitals are conspiring to restrain trade through “exclusive dealings,” courts have generally ruled that such conduct is not unlawful if the hospital does not have market power and has a good business reason for its exclusive contract. Hospitals usually cite numerous efficiencies and economic reasons to support their exclusive dealing arrangements.

Tying Arrangements

A tying arrangement is defined as a situation where a seller sells a product (the tying product) or service on the condition that the buyer also purchases a different product (the tied product). For example, a hospital will provide surgical services to patients, but only if the patients agree to pay for the anesthesiology services, which the hospital provides through a contractor with which the hospital has an exclusive arrangement. Courts require two conditions for such conduct to be unlawful under the antitrust laws: 1.) the seller (hospital) has the market power, and 2.) the customer is “coerced” into purchasing the tied product. Note, however, that some courts have clearly distinguished coercion from aggressive marketing and persuasion.

MONOPOLIZATION
Sherman Act, Section 2

It may be perfectly legal for a business, or physician, to have a monopoly, provided the monopoly has not resulted from curbing competition. Anyone who challenges a monopoly or attempted monopolization must show that the defendants have sufficient market power to raise prices and exclude competition. For physicians, monopolization claims arise in some of the following areas.

Staff Privileges

Physicians who lose their hospital privileges as the result of a negative finding in the peer review process often claim that the reviewing physicians recommended an adverse action against them, not for quality-of-care reasons, but because the reviewers compete in a specialty that they wish to monopolize. Such claims are also filed under Section 1 of the Sherman Act if more than one party is involved in the alleged conduct.

Essential Facility

Courts generally recognize a claim for access to an essential facility if the use of that facility is indispensable to the person in need of it. When physicians are denied privileges at a hospital, they sometimes file antitrust lawsuits under Section 2, claiming that access to the given hospital is essential for the practice of their profession and that the hospital has denied them access because it wants to monopolize the medical services in that market. These cases have not often been successful, mainly because courts, as a matter of public policy, have usually refused to force hospitals to grant privileges to physicians.

Buyers' Market Power

In various healthcare markets, buyers of hospital and physician services, such as large health insurance companies or MCOs, often exercise their market power in the purchase of these services for their subscribers. These insurers and MCOs have become a major concern for physicians in recent years as they've become larger and larger. Doctors claim they have been forced to sell their services to these powerful buyers at extremely low or below-cost prices. Unfortunately, courts have generally ruled that hard bargaining does not violate antitrust laws unless there are other issues involved that may restrain trade and reduce competition.

PRACTICE MERGERS
Clayton Act, Section 7

When big businesses merge, the government's major concern is whether such a merger will cause a reduction in competition, which may, in turn, enable the merging entities to raise prices. Although medical practices are not generally considered to be big businesses, a merger of two large practices in a small town could have the effect of limiting the choices of patients and health plans in their

purchase of healthcare services. Managed care has caused unprecedented expansion and mergers of physician practices, and the Affordable Care Act and changing payment models have also encouraged hospital system mergers and encouraged those hospital systems to purchase physician practices. The antitrust law enforcement agencies have become very diligent in monitoring and analyzing the effects of practice mergers on competition, and have, in fact, blocked many practice mergers. Section 7 of the Clayton Act is usually the statute used to challenge a merger that may result in a substantial reduction of competition.

TYPES OF VIOLATIONS

Legally, there are two types of antitrust violations. When an antitrust case is filed, the first step in the court's analysis is to determine which type of violation is being alleged.

Per Se

There are certain types of conduct that are automatically considered to be so detrimental to the market that they are seen as being without possible redeeming merit. For example, it is believed that price-fixing or market allocation simply cannot benefit society in the long run. These are known as **per se** violations, since they are considered to be inherently antisocial. Courts generally do not allow any defense in justification of these behaviors.

Rule of Reason

In the other category of violations, the facts of the case are analyzed under the **rule of reason**, in which the courts allow defendants to present evidence that justifies their conduct. If the reasons presented can be deemed to be procompetitive and/or the challenged conduct is likely to bring efficiency to the market and improve the lot of consumers, the courts may exonerate the defendants.

STANDING TO SUE UNDER THE ANTITRUST LAWS

Besides federal antitrust laws like the Sherman and Clayton Acts discussed above, there are a variety of antitrust laws that have been enacted by the various states.

Federal antitrust laws are enforced by the Department of Justice and the Federal Trade Commission (FTC). State antitrust laws are enforced by the state attorney generals. Besides this government enforcement, private parties who are directly affected by a violation of antitrust laws also have a right to sue. Plaintiffs must be able to prove a direct injury caused by the alleged violations, or ask for an injunction to stop certain conduct of the defendants or to require them to do certain acts. Not surprisingly, antitrust cases are extremely complex, expensive, and time consuming.