Legal Briefs

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Antitrust protection against a hospital's denial of access

A recent volume of *American Law Reports, Federal Series* includes an annotation (89 ALR Fed 419) on violation of the Sherman Antitrust Act by a hospital when it denies staff privileges or referrals to physicians or other health care practitioners. Several cases cited in the annotation for key points are cases involving nurse anesthetists.

The Sherman Act prohibits conspiracies "in restraint of trade or commerce among the several states," (Section 1.) It also prohibits monopolizing "any part of the trade or commerce among the several states," (Section 2.) Numerous health care practitioners have claimed that a hospital's refusal to permit them to practice was illegal under one, or both, of the provisions of the Sherman Act.

In addition to citing nurse anesthetists, the annotation also discusses suits brought by anesthesiologists and radiologists denied privileges because of exclusive contracts, and other practitioners denied privileges because they were members of certain professions. Here, as in other areas of health care little understood by the judicial system, the law does not change from case to case, but courts have difficulty interpreting quite similar factual patterns, with the result being that entirely different conclusions are reached.

Anesthesia practice and interstate commerce

One of the first issues to be addressed is the requirement that either the conspiracy or the monopolization affect "trade or commerce among the several states or with foreign nations." Does anesthesia practice affect trade or commerce among the several states? The inquiry begins with the question: *What* has to impact on interstate commerce? Is it the activities of the defendant hospital, the activities of the health care provider or the anticompetitive practice? The annotation includes a number of cases, none necessarily consistent, discussing what must affect interstate commerce.

Some courts have been satisfied with evidence that the hospital treats out-of-state residents, purchases supplies, drugs or equipment from out-of-state suppliers or receives payments from Medicare, Medicaid and other third-party payors located out-of-state. In other cases (often in cases where it is obvious that the Court did not think much of the case as a whole), the Court has referred to this same evidence as showing only a *de minimis* or insubstantial effect on interstate commerce. The same arguments and inconsistent results are made and seen where the Court believes that the practitioner's business or the denial of access must affect interstate commerce.

Can one conspire with oneself?

The most important issue to be faced is whether or not there is a conspiracy or contract. Complicating the health care area is the principle that an entity, such as a corporation, cannot "conspire" with itself. Some cases have indicated that the head of a hospital department cannot *conspire* with the hospi-

tal's Board of Directors or administration since the head of the department, Board of Directors and administration are all part of the same economic entity.

In one of the cases cited in the annotation, *Weiss u York Hospital,* 745 F2d. 786 (1984), the Court approached the issue in a very intelligent fashion. "Anti-trust policy requires the courts to seek the economic substance of an arrangement, not merely its form," said the Third Circuit Court of Appeals. The Court concluded that the medical staff, itself, was a *"combination"* of individual doctors. Therefore, any action taken by the medical staff "satisfies the contract, combination or conspiracy requirement of Section 1 [of the Sherman Act].

The annotation also discussed a number of decisions, which have followed an *exception* to the "You-Can't-Conspire-With-Yourself" defense. The courts noted that one or more members of the medical staff often "has an economic interest separate from, and in many cases in competition with, the interest of other medical staff members."

In a case published with the annotation, the Court sent back for retrial that portion of the jury's decision which found that there was a conspiracy between a hospital and its executive committee. The Court was careful to point out that there was no evidence "that any of the individuals who served as members of the executive committee were, as individual physicians, motivated in any respect by any desire for personal economic gain." *Navavati u Burdette Tomlin Memorial Hospital,* 645 F. Supp. 1217, 89 ALR Fed 369.

The significance of the requirement that the restraint result from a conspiracy was best illustrated by a very favorable case for nurse anesthetists, *Oltz u St. Peters Hospital,* 656, F. Supp. 760, 762, where the presiding judge indicated that "in my opinion, St. Peters might have done everything that it did do, if it had done so in the absence of a conspiracy."

Restraint of trade

The next matter of proof, is that there be an anti-competitive effect to the conspiracy. Obviously, every contract, in one way or another, restrains trade. A test of "reasonableness" must be used and the action must have the effect of restraining competition in a relevant market.

How does one show that the act restrains competition in a relevant market? Expert testimony, often expensive and sometimes difficult to obtain, establishes the relevant market and what effect the restraint has in the market.

For example, in *Bhan u NME Hospitals, Inc.,* 669 F. Supp. 998, the Court noted that there were at least five hospitals within what, in the absence of expert testimony, the Court deemed to be the relevant market. Since the Court found that the defendant hospital did not control the market, it was concluded that the defendant's anesthesiologist-only policy was not actionable under the Sherman Act. On the other hand, in *Oltz u St. Peter's Hospital,* where the nurse anesthetist prevailed, St. Peter's was the only hospital equipped to do general surgery and its market share was 84%.

There is an exception to the requirement of expert testimony where the courts have held that the nature of the restraint can never be reasonable. These restraints, unreasonable *per se* (by themselves) include agreements which fix prices, allocate markets, establish group boycotts or tie-in sales of a desired product with another. Because expert testimony is so expensive, the practitioner will try to establish that the hospital's conduct is prohibited under one of the *per se* rules.

This was successful in *Weiss u York Hospital.* The Court indicated that in the absence of a legitimate explanation for the discrimination of an MD hospital against an osteopath, the Court would treat the case as a "refusal to deal" or group boycott which is illegal *per se.* Even if the hospital does not have sufficient market power on its own, the denial of access may be part of an effort that extends beyond the hospital affecting what may be a relevant market. In the *Bhan* case, the Court relied on the fact that not only were there other hospitals in the market area but that nurse anesthetists practiced at them.

Exclusive contracts

Finally, exclusive contracts have also been attacked as refusals to deal or tie-ins, arguably illegal *per se,* under the anti-trust acts. In *Jefferson Parish Hospitals u Hyde* (in which the AANA filed an *amicus curiae* brief explaining the functions and capabilities of nurse anesthetists), the Court indicated that where a hospital lacks substantial monopolistic power (Jefferson Parish Hospital's market share was less than 30%), its actions were not actionable under the Sherman Act.

Conclusion

Protection under the anti-trust laws has, and will continue to be, extremely helpful to nurse anesthetists and nurse anesthetists have already played a key role in expanding this area.