Legal Briefs

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Bhan vs. NME Hospitals, Inc.: Antitrust standing of CRNAs sustained

In a landmark decision for nurses in an expanded role, the United States Circuit Court of Appeals for the Ninth Circuit recently held that a CRNA dismissed from employment as the result of an agreement among MD anesthesiologists and the employer hospital has the right to sue under federal antitrust laws. (*Bhan v. NME Hospitals, Inc.*, 84-2256, D.C. No. CV-S-83-295 LKK, (October 2, 1985.)

The decision establishes the principle that in some circumstances, nurses "compete" with doctors in providing services to hospitals, patients and other doctors, and that anticompetitive arrangements designed to exclude CRNAs from practice inhibit competition and are illegal.

Background

According to the complaint, Mr. Bhan, a CRNA, served as one of two anesthesia providers at Manteca Hospital, the only acute medical care hospital in the Manteca, California area. It is alleged that the hospital anesthesiologist and the California anesthesiologists' professional associations pressured the hospital to terminate Mr. Bhan's employment through the adoption of an "MD only" anesthesia policy. By so doing, the hospital eliminated nurse anesthesia practice from the only significant hospital in the area.

Deprived of 80% of his practice, Mr. Bhan sued the hospital and the participating anesthesiologists and anesthesiologists' professional associations in federal District Court under federal and California State antitrust laws. However, the District Court dismissed the complaint on the grounds that nurse anesthestists and anesthesiologists do not compete. The District Court concluded that as a technical, legal matter, California licensure laws prohibit nurses from competing in the same markets as doctors.

Under California law, as in other states, nurse anesthetists are licensed to practice anesthesia only under the supervision of a physician, while MD anesthesiologists are under no similar constraint. The defendants persuaded the District Court that as a matter of law this technical licensing distinction precluded any competition. The District Court concluded that since nurse anesthetists are licensed to practice only under the supervision of a practicing physician, they do not function in the same markets as anesthesiologists, and therefore the two groups do not compete. According to the District Court, Mr. Bhan could not, therefore, claim antitrust injury in a market in which he could not lawfully compete, and so his complaint was dismissed.

Competition and the expanded-role nurse

The issue of whether CRNAs and anesthesiologists "compete" is of great importance to nurses. Prior to 1943, it was not believed that the antitrust

laws applied to doctors. In 1943, the United States Supreme Court, in *American Medical Association v. United States,* 130 F.2d 233 (D.C. Cir. 1942), aff'd 317 U.S. 519 (1943), applied the antitrust laws against medical professionals to thwart the AMA's then efforts to boycott group health plans.

In the years that have followed, the issues have become ever more pressing as nurses have expanded their roles, performing a variety of tasks previously within the domain of doctors. At the same time, as more and more doctors have graduated from medical schools, nurses have increasingly been faced with greater physician involvement in areas, such as anesthesia, that have been dominated by nursing.

The District Court decision, however, failed to follow the established economic analysis of relevant markets. A market, such as for anesthesia service, is defined by an economic analysis called "cross-elasticity" of demand. Cross-elasticity is said to exist between two products or services when their use is reasonably interchangeable for consumers, and is normally evidenced by a reaction to relative changes in price. In the classic example, butter and margarine compete in the same market for spreads—if the price of butter goes up by $1.00 a pound, many consumers will react by switching to margarine. Thus, the cross-elasticity of demand between butter and margarine is generally regarded as very high.

Decision of Appeals Court

The Circuit Court of Appeals in *Bhan* correctly applied this accepted analysis, rejecting the technical and economically irrelevant distinctions which the District Court derived from the variation in licensing laws. Admitting that doctors and nurses function under different licensure constraints, the Circuit Court reasoned that the issue is not whether the two groups perform *identical* services, but whether there is "reasonable interchangeability of use or . . . cross-elasticity of demand between the services provided by nurse anesthetists and by MD anesthesiologists."

The Circuit Court concluded:

"No doubt the legal restrictions upon nurse anesthetists create a functional distinction between nurses and MD anesthesiologists. They do not, however, necessarily preclude the existence of a reasonable interchangeability of use or cross-elasticity of demand sufficient to constrain the market power of MD anesthesiologists and thereby to affect competition."

The court concludes that "as a matter of law, Bhan's allegations are sufficient to establish that he is a proper party to bring this antitrust action."

Conclusion

While the issue of a functional distinction between nurse anesthetists and anesthesiologists could be argued, the appellate decision in *Bhan* re-affirms an important stage in the historical and legal process that has been in progress since the *American Medical Association* decision in 1943.

Most importantly, the appellate decision in the *Bhan* case rejects the position that nurse anesthetists and anesthesiologists do not compete, a position that has been heard from various anesthesiologists. Anesthesiologists can no longer claim to be immune from the antitrust laws based on exaggerated differences in state licensing laws.