

AAPS Legal Supplement: Antitrust Issues

by Andrew Schlafly, Esq.

The Arizona chapter of the Association of American Physicians and Surgeons, Inc. ("AAPS") has requested an opinion on the application of federal antitrust laws to physicians attempting to address the malpractice crisis.

First, a bit about the background of AAPS and myself. Since 1943, AAPS has helped physicians build practices based on free enterprise rather than on government or managed care systems. Now its General Counsel, I have personally advised physicians for over ten years on antitrust matters without a single one ever encountering any complaints by federal antitrust authorities, or any private antitrust lawsuits. I recently won a jury verdict in defending a trade association against a \$20 million antitrust action in Newark, New Jersey. My background includes a clerkship with the Court of Appeals for the D.C. Circuit (for Judge Douglas Ginsburg, formerly of the Antitrust Division) and also a job with a federal agency in Washington. Antitrust laws and federal law enforcement are very familiar to me.

Nearly all antitrust actions against physicians can be summed up in one word: price-fixing. That is illegal, and physicians should not share, exchange, cooperate or agree with respect to the prices they charge insurance companies, the government, or patients. But enforcement actions against physicians for anything other than price-fixing are extremely rare, almost unheard of in the past decade. Antitrust enforcement was greatly reduced under the Reagan Administration, and the current Bush Administration adheres to a similar laissez-faire approach. Notice, for example, how the antitrust action against Microsoft was relaxed as soon as the Bush Administration came into power.

In theory, it is possible to be subject to an antitrust lawsuit or enforcement action for conspiracy to restrain trade without price-fixing. An example would be the AMA guideline labeling "unethical" any referral by a physician of a patient to a chiropractor. The AMA set up a Committee on Quackery in 1963 which aggressively attempted to eliminate chiropractors. Ultimately a court found this to constitute restraint of trade, and thereby violate the antitrust laws. Similarly, a purely commercial boycott of a private company could be scrutinized for possible violation of antitrust laws. But restraint-of-trade actions typically focus on one group trying to eliminate a competitor. They are almost never applied against physicians (or anyone else) in the absence of injury to competitors or the public. A federal enforcement action now against a physician for restraint of trade other than price-fixing would be highly unlikely.

Of the two above antitrust concerns – price-fixing and restraint of trade – we can eliminate the issue of price-fixing immediately. It is simply irrelevant to the malpractice crisis. None of the physician meetings about the malpractice crisis entail discussions of setting prices charged to patients, nor would there be any reason for that dialog. The major focus of

the antitrust laws to combat price-fixing is simply inapplicable here.

Concerning other restraints of trade, generally only *unreasonable* restraint of trade by agreement is unlawful. Individual physicians can always say and do whatever they like without concern about application of antitrust laws. An individual can speak out or refuse to deal with any insurance company, hospital or patient. Moreover, physicians can meet to discuss and take political action as they see fit. The First Amendment and Noerr-Pennington doctrine protect the rights of citizens to lobby and petition their government without interference by antitrust law. Freedom of speech is a constitutional right that federal statutes cannot limit. People can and should speak their minds individually and collectively.

There is no difficulty under antitrust laws for a physician to change or terminate his practice owing to the malpractice crisis, and to speak out accordingly. Nor is there any problem with a group of physicians, even in an emergency clinic, shutting down their business based on the malpractice crisis. A group of emergency physicians in Las Vegas did precisely that a few years ago, with dramatic political effect. The legislature quickly passed tort reform that it had previously refused to enact. When insurance costs rise so high that it is uneconomical to practice, then nothing in the antitrust laws prevents physicians from shutting down a practice.

Political boycotts are also perfectly legal, and have been used since the beginning of our country. Antitrust plaintiffs attorneys will pretend that all "boycotts" are illegal. In fact, they can be a particularly effective means of engaging in political protest. Economic boycotts can be antitrust violations if they go beyond political expression, but that difficulty can be easily addressed by modifying the nature of the action. Physicians need not "boycott" a particular insurance company or hospital. Instead, physicians can advocate against unethical provisions in insurance contracts or unethical requirements of hospitals.

What are some practical options based on the above with respect to the malpractice crisis? Antitrust laws do not limit an individual's ability to exercise free speech, which is a constitutional right under the First Amendment. Freedom of association is another First Amendment right, and physicians may gather and discuss their options to address the malpractice crisis. AAPS recently circulated a letter suggesting several options to pursue, perhaps simultaneously, to attain malpractice reform.

One option is to eliminate professional liability coverage as a condition of credentialing, or at least lower the mandated limits of coverage. Hospital requirements that physicians carry substantial malpractice coverage should be relaxed as a condition of privileges. Malpractice coverage merely serves as bait for more and more lawsuits, no matter how frivolous. Local, state and national medical societies should urge hospitals and health plans to change existing rules. Physicians should consider favoring hospitals and plans that do not impose onerous malpractice requirements. Hospitals and plans imposing the largest malpractice requirements should be publicized. None of this implicates any antitrust concerns.

Another option is for physicians to share litigation defense ideas and tools with others, as malpractice attorneys already do in targeting physicians. Again, there is no antitrust issue here. Attorneys have done this for years. The AAPS self-organizing internet forum (<http://aaps.forums.commentary.net>) is a good place for these discussions and sharing of information. There is obviously no antitrust violation in this activity.

An additional option is to expose hired guns who provide perjured or incompetent testimony. Again, publicizing outrageous testimony is fully protected free speech. People who commit perjury or are incompetent should be exposed so that they cannot continue to inflict injustice. Sometimes, as in the Martha Stewart case, the government even prosecutes a perjurer. Nominees for the Hall of Shame at www.aapsonline.org are being considered, and items have already been posted. Send e-mail to jorient@mindspring.com for information on this approach. Again, there is no antitrust problem here.

Yet another option is to imitate the approach of many other industries, which offer or require waivers and disclaimers with respect to customers. Many patients want their physician's attention without all the distortions and stresses of malpractice lawsuits, depositions, interrogatories, absurd verdicts and so on. Most patients want medical care free from the distractions of malpractice litigation. Those patients have the right to obtain care under those conditions. Forms offering malpractice-free medical care should be circulated for physicians who, in their independent judgment, would like to use them or a modification of them. This violates no antitrust laws.

As noted above, Noerr-Pennington doctrine and the First Amendment protect individual and collective advocacy of legislation against any antitrust complaint. Medical societies can and should vigorously demand legislative solutions to the problem. This could include expanding confidential monitoring and reporting of errors or near-misses, thereby protecting against system errors while concealing the data from discovery. In addition, Good Samaritan laws could protect all services rendered in an emergency against claims. Certification requirements of a meritorious claim could be strengthened, and losers could be required to pay the winners' (typically defendants') legal costs.

Other legislative solutions, such as adding new procedural requirements to malpractice cases as set forth in Arizona Senate Bill 1113, are worth considering and supporting. This bill says its purpose "is to curtail the filing of frivolous lawsuits against health care professionals and the filing of frivolous nonparty at fault designations by health care professionals." That is what we need to advocate and enact into law.

Admittedly, there are political obstacles to malpractice reform. Trial attorneys typically oppose any legislation addressing runaway malpractice verdicts or frivolous actions. Political allies of trial attorneys, sometimes even a few medical societies, may obstruct reform in this area. But federal antitrust requirements can be fully satisfied in individual and collective actions by physicians to address the malpractice crisis.

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