Denial of Hospital Privileges: Antitrust Implications

The following information on antitrust issues was provided by legal counsel at Foley, Lardner, Weissburg and Aronson, Inc.

Q: Are there antitrust implications if a hospital refuses to grant privileges to a PA?

A: It is possible, but unlikely in most circumstances, that the antitrust laws will provide an effective remedy for exclusion from hospital privileges. Determining whether an antitrust violation exists in any particular case will be very fact-specific and depend on a number of circumstances, including who ultimately controls the privilege decisions, the purpose of the exclusion, and the resulting competitive or anti-competitive effect.

If the process for the denial of privileges is effectively controlled by competitors of PAs, the excluded PAs will have a better chance of establishing that the denial process was the result of an anti-competitive conspiracy. (As discussed in the following question, in some cases competitors may include physicians.) On the other hand, if the decision making process is ultimately controlled by individuals who are not competitors to PAs and do not simply rubber stamp recommendations of the Pas' competitors, it will be difficult for the excluded PAs to prove that denial of privileges was motivated by anti-competitive goals. Thus, if a hospital board of directors is not controlled by competitors of PAs and makes an independent decision to deny PA privileges, such exclusion will be difficult or impossible to attack.

The reasons used to reject PAs' applications will also be important in assessing whether there were any anti-competitive motives involved. For example, if the purpose of excluding PAs is to inhibit competition with physicians by PAs or physicians employing PAs, such motivation to protect the status quo is antitrust suspect. If, on the other hand, the exclusion is based on good faith (though perhaps misplaced) concerns about quality of care, the image of the institution, or similar factors, the motive for exclusion will be less supportive of antitrust claims.

In addition to the foregoing factors, the context in which the exclusion occurs will almost always be important in determining whether an antitrust violation may exist. For example, if the only hospital in a geographic area is involved, it is more likely that the exclusion of the PAs, absent bona fide justifications as determined by the hospital's governing board, will have anti-competitive effects and thus provide a basis for an antitrust claim. On the other hand, exclusion of PAs from a single hospital in a metropolitan area is unlikely to generate any significant anti-competitive effects in either the market for hospital services or services provided by PAs. And, of course, it will also be significant whether the denial of privileges is specific to individual PAs -- that is, affects only a particular applicant or applicants - or whether there is wholesale denial of privileges to all PAs. The latter scenario is more suspicious and more likely to attract antitrust agency interest.
Thus, who decides the privileges issue, as well as purpose and effect of excluding PAs, are key determinants in the antitrust evaluation.

**Q:** Since the most serious antitrust violations appear to involve agreements among or actions by competitors, exactly how do PAs determine who are their competitors?

**A:**
Determining who are competitors requires an economic analysis. The answer is based principally on buyers' (i.e., patients' or payers') perception of alternatives or substitutes for the services provided. Economists refer to this as cross-elasticity of demand. In lay terminology, any two sellers whose services or products are viewed as reasonably substitutable or interchangeable with each other from the buyers' perspective are probably competitors.

Both the services provided by the professionals and the geographic proximity of the professionals are relevant in determining whether they are competitors. If patients (or payers) consider two professionals as alternatives for rendering care or entering into a contract, these professionals are probably competitors for purposes of antitrust analysis. If different types of health care professionals can perform the same or comparable services within the scope of their respective licenses, they should be considered competitors for such services. Thus, in certain circumstances, a PA may be a competitor not only to other PAs, but also to physicians, nurses, nurse practitioners, etc.

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