



Antitrust Reform

Background

The Sherman Antitrust Act and the 1996 Statements of Antitrust Enforcement Policy in Healthcare (1996 Statements) are two of the legal sources relating to physician provider activity issued by the Department of Justice (DOJ) and the Federal Trade Commission (FTC), which share enforcement authority. The 1996 Statements provide some guidance on what the DOJ and FTC will pursue and define some “safety zones” for provider behavior. Historically, antitrust laws are meant to preserve a competitive marketplace. Some cooperative arrangements between competitors may be regarded as a restraint on competition and possibly illegal. Independent, self-employed healthcare practitioners are considered competitors in the market for physician services, and certain physician conduct in this marketplace may be considered “illegal per se” – that is, a court would not use the “rule of reason” to review this type of activity. “Per se” violations include price-fixing, group boycotts and signaling (which is essentially an inferred boycott). As a result, non-qualified groups and individual practitioners may be at a great disadvantage in their ability to negotiate with insurance companies. Despite the contentions of the health insurance industry, the current antitrust landscape provides very limited ability for physicians to pursue joint negotiations, and the legal hurdles and costs are prohibitive for the majority of physicians. Although the 1996 Statements set forth the “messenger model” allowing for a third party to negotiate on behalf of an individual physician, the model in practice can be cumbersome and expensive and still may leave the health insurance industry at a great advantage. Furthermore, minimal variations from the model may result in antitrust allegations. Enactment of the Competitive Health Insurance Reform Act of 2020 (P.L. 116-372) removes the exemption for health and dental insurers from the McCarran Ferguson Act and thereby allows the FTC and DOJ to get involved in perceived anti-competitive behavior of health insurers when states are unable or unwilling to do so. The true impact of this law on provider-insurer relationships is uncertain and yet to be realized.

Position

The American Association of Oral and Maxillofacial Surgeons (AAOMS) supports competition in healthcare that may result in improved patient care, access, quality and cost while maintaining patient safety. However, it appears that a significant number of mergers in the managed care and healthcare insurance industry have resulted in an expanded market share for many healthcare plans. Patients may have fewer choices for health insurance, and the individual practitioner is likely to be at a competitive disadvantage when pitted against massive insurance companies that may use the threat of an antitrust investigation to leverage and intimidate. In many respects, the laws that seek to create a competitive marketplace in the healthcare industry as a way to benefit patients may result in even greater market control by insurance companies. Therefore, AAOMS strongly supports legislative efforts to create more equitable negotiations between practitioners and health insurers to improve the availability, quality and fair value of healthcare. Furthermore, AAOMS will continue to support appropriate legislative and regulatory efforts to address apparent inequities of physicians under the antitrust laws and for greater scrutiny of insurers. AAOMS also will help educate its membership concerning antitrust law and regulation.

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