UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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PREPARED STATEMENT(1)
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BEFORE THE
JOINT COMMITTEE ON THE PUBLIC INTEREST
IN COMPETITIVE PRACTICES IN HEALTHCARE
OF THE VERMONT LEGISLATURE

OCTOBER 20, 1994

Madam Chairman and Members of the Committee: I am pleased to appear before you today to discuss competition and antitrust enforcement in health care markets. This testimony and my responses to your questions represent the views of the staff of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

Competition in health care markets has benefited consumers. Antitrust enforcement has been a significant factor in the emergence of potentially procompetitive methods of delivering health care services, such as managed care. Statutory antitrust exemptions could permit behavior that injures consumers and the economy. We know of no antitrust orders prohibiting cooperative agreements to improve efficiency or enhance the quality of care. Thus, we question whether granting antitrust immunity is necessary to achieve the goals sought. Because it may be difficult to ensure that, once agreements are authorized under

that prohibited physicians from affiliating with health care plans, and enforcement actions that have halted organized boycotts by some health care providers against newly developing health care arrangements.(17)

The Commission's experience in health care markets has shown that, without the protection that antitrust law provides, efforts to contain health care costs, and to create innovative delivery systems to better serve consumers, sometimes can be frustrated by provider opposition. More broadly, to the extent that health care reform depends on market mechanisms to improve the price and quality of the health care Americans receive, antitrust enforcement will help make reform work by promoting and maintaining competitive health care markets.

concerns. In a recent order blocking a hospital merger in a highly concentrated market, the Commission exempted from the order's reporting requirements any prospective joint ventures the hospitals might decide to undertake to provide data processing, laboratory testing, and health care financing.(25) These joint ventures appeared likely to achieve efficiencies and improve specific services, without endangering price and quality competition for other services, as a complete merger could.

The Commission not only has limited its enforcement actions to hospital mergers that could have been genuinely harmful, but also has made considerable efforts to publicize and clarify its enforcement policies in that area so as not to discourage legal, beneficial transactions. The Federal Trade Commission and the Department of Justice have issued Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust specifically addressing areas of concern to members of the health care industry. A set of six statements was issued a year ago; last month, those statements were updated and expanded.

The "antitrust safety zones" that are included in most of the policy statements describe the circumstances under which the federal antitrust law enforcement agencies will not challenge certain collaborative activities by hospitals, doctors, and other health care providers. The policy statements go on to expla

A statement has been added explaining how the agencies analyze multiprovider networks, which are ventures among providers to jointly market their services to health benefits plans and others. If such networks involve agreements that

details of a scheme that supplants competition; the mere potential for a state supervisory action is not enough.(32) Applying this requirement to health care, it has been held that an authorizing certificate would not confer antitrust immunity, in the absence of post- E)5(E; /T

(6) Another subject of this hearing is a bill about pharmacies and prescription drugs that was considered in the last legislative session and is expected to be introduced again in the next one. The staff of the Commission has commented several times, in other jurisdictions, about “any willing provider” features comparable to those in this bill. Copies of those recent comments are attached to this statement for your information.

(7) Proposed Section 9460.

(8) Proposed Section 9462(d).

(9) Proposed Section 9461(a).

(10) Proposed Section 9462(d)(1).

(11) Proposed Section 9462(d)(2).

(12) Proposed Sections 9460, 9465(a).

(13) Proposed Section 9462(e). Certificates would be granted only if “clear and convincing” evidence showed that benefits outweighed disadvantages, but they could be revoked if only a preponderance of the evidence showed that the balance had shifted the other way. Proposed Section 9465(b).

(14) See letters from Federal Trade Commission concerning H.R. 3486 and S. 1658 to The Honorable Jack Brooks, Chairman, Committee on the Judiciary, United States House of Representatives, and The Honorable Howard M. Metzenbaum, Chairman, Subcommittee on Antitrust, Monopolies, and Business Rights, Committee on the Judiciary, United States Senate (June 10, 1994). The Department of Justice has also taken a similar position. See letter from Anne K. Bingaman, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, to The Honorable Howard M. Metzenbaum, (April 14, 1994).

(15)” U.S. v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

(16) See e.g., the “Cleveland Clinic” cases: Medical Staff of Holy Cross Hospital, FTC Docket No. C-3345, 56 Fed. Reg. 49184 (1991) (consent order); Medical Staff of Broward General Medical Center, FTC Docket No. C-3344, 56 Fed. Reg. 49184 (1991) (consent order); Diran Seropian, M.D., FTC Docket No. 9248, 57 Fed. Reg. 44748 (1992) (consent order).

(17) See e.g., Baltimore Metropolitan Pharmaceutical Association, Inc., FTC Docket No. D- 9262, 59 Fed. Reg. 15733 (1994).

(18) The Commission is not in a position to make broad predictions or recommendations about what the hospital industry will or should look like in the next century. The Commission’s involvement in the health care field is limited to the enforcement of certain antitrust and consumer protection statutes. While that role is important, the Commission’s experience with, and expertise in, health care is limited and specialized, as compared to agencies such as the Department of Health and Human Services.

(19) Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992).

(20) Id.

(21) Claims of efficiencies will only be considered if they are realistic and supported by the evidence. Notably, in three of the four hospital merger cases decided after litigation in which potential efficiencies were a significant issue, the hospitals’ arguments on that issue were rejected as factually unpersuasive. See FTC v. University Health, Inc., 938 F.2d 1206, 1223-24 (11th Cir. 1991); United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1287-91 (N.D. Ill.

1989), aff d, 898 F.2d 1278 (7th Cir.), cert. denied, 111 S.Ct. 295 (1990); American Medical Int'l, 104 F.T.C. 1, 148-155, 218-

(33) See P.I.A. Asheville, Inc. v. North Carolina, 740 F.2d 274, 278 (4th Cir. 1984), cert. denied, 471 S.Ct. 1003 (1985) (certificate of need approval for hospital acquisition did not immunize from antitrust challenge; there was no active supervision of post-certificate conduct, and the federal program that the certificate of need process implemented did not displace the antitrust laws).