Oncology Issues

ISSN: 1046-3356 (Print) 2573-1777 (Online) Journal homepage: https://www.tandfonline.com/loi/uacc20

Antitrust Policy and Health Care Safety Zones

John S. Hoff

To cite this article: John S. Hoff (1994) Antitrust Policy and Health Care Safety Zones, Oncology Issues, 9:1, 10-10, DOI: 10.1080/10463356.1994.11904445

To link to this article: https://doi.org/10.1080/10463356.1994.11904445

Published online: 18 Oct 2017.

Antitrust Policy and Health Care Safety Zones

by John S. Hoff

Antitrust law and health care: If they do not go together like love and marriage, can they at least cohabit?

Federal policy is schizophrenic. On the one hand, the federal government wants to shrink excess capacity in the health care field and avoid duplication of facilities and services on the theory that this will reduce costs. On the other hand, antitrust laws promote competition, which requires duplication. Add to this the unique nature of the health care system (it is not clear who is the buyer and who is the seller) and the distorting effects of third-party reimbursement, and it is apparent that application of traditional antitrust law is more complicated when it comes to health care.

The field has for a long time sought changes in the antitrust law as they apply to health care and better guidance as to their requirements. In response, Hillary Rodham Clinton promised guidelines from the federal government. These guidelines were issued by the Federal Trade Commission (FTC) and the Department of Justice in September. While the tone of the announcement is sympathetic to the field, the actual terms of the guidelines provide little guidance. Essentially, they permit activity that already is recognized to be permissible. They authorize the easy cases and do not provide guidance on the more difficult ones.

The guidelines address six areas:

1. Hospital mergers. The federal agencies will not challenge a merger in which one of the merging hospitals has fewer than 100 beds and has an average daily inpatient census of less than 40 patients.

John S. Hoff is ACCC Legal Counsel with Swidler & Berlin in Washington, D.C.

2. Hospital joint ventures. The federal agencies point out that they have never challenged a joint venture between hospitals to purchase or operate expensive medical equipment. They state, therefore, that they will not challenge a joint venture that is necessary to recover the costs of expensive equipment and that does not include a hospital that could have offered the service without the joint venture.

> Antitrust laws remain an important, and still ambiguous, regulator of the field.

3. Information from physicians. The agencies provide a safety zone for physicians to collectively provide non-price information to purchasers of health care services. This relates to the collective provision of underlying medical data and suggested practice parameters. It does not apply to fees or to joint actions by physicians to refuse to deal with a purchaser because they object to its terms.

4. Hospital information. The agencies permit hospitals to participate in written surveys of prices for services and wages and benefits paid to personnel. For the safety zone to apply, the survey must be managed by a third party, the information must be at least three months old, and the information must be aggregated so that no particular hospital can be identified.

5. Joint purchasing. The agencies recognize the validity of joint purchasing arrangements among providers—if a) the joint purchasing group does not account for 35 percent or more of the total purchases of the product or service in the relevant market, and b) the cost of what is being purchased accounts for less than 20 percent of the total revenues of the participants in the joint purchasing arrangement.

6. Networks. Physicians may form and control network joint ventures and jointly market their services if not more than 20 percent of the physicians in each specialty are included and if the members of the joint venture share substantial financial risk among themselves.

These safety zones indicate the types of problems the antitrust agencies are concerned with and provide a slight amount of comfort to the field. Most significant perhaps is the defensive tone that permeates the agencies' policy statement. This implies that whether or not a transaction actually fits within the safety zones provided, the agencies might be somewhat more reluctant to bring an enforcement action than they would be in the non-health care field. However, the antitrust laws remain an important, and still ambiguous, regulator of the field.

The policy statement issued by the FTC and the Justice Department also commits them to answer on an expedited basis (i.e., within 90 days) antitrust requests for guidance concerning joint ventures. ■