



BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

July 10, 1991

Patrick M. Sheller, Esq.
McKenna & Cuneo
1575 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Sheller:

This responds to your request for an advisory opinion concerning certain actions that your client, Benedictine Health Centers, intends to undertake. According to your letter, Benedictine Health Centers ("Benedictine"), owns and operates two hospitals located about ten miles apart: St. Thomas More Hospital, located in Canon City, and St. Joseph Hospital, located in Florence, Colorado. Benedictine intends to close St. Joseph Hospital and convert the building to medical offices. Benedictine has provided free office space near St. Joseph Hospital to several physicians who currently practice there. This was done in order to assist those physicians in establishing practices in the community. However, Benedictine has recently made a unilateral decision that it will no longer provide free office space to those physicians. Instead, Benedictine plans to recruit different physicians, some of whom practice in the same specialties as the physicians who have been receiving free office space, to practice at St. Thomas More Hospital. As an inducement to those physicians, Benedictine plans to provide the newly recruited physicians with free office space and support services in the office building that will occupy the present site of St. Joseph Hospital.

The physicians who are currently receiving free office space have privileges at St. Thomas More Hospital, and will continue to do so. Benedictine believes that rental office space is available in the vicinity of St. Thomas More Hospital.

The question on which you have requested an advisory opinion is as follows:

whether Benedictine's unilateral decision to close the Florence facility, to convert it to physician office space, and to provide free space in that facility to newly recruited specialty physicians, but not the incumbent specialists, may violate Section 5 of the Federal Trade Commission Act.

Based on your description of the conduct that Benedictine proposes to undertake, it does not appear that the contemplated actions are likely to violate Section 5 of the Federal Trade Commission Act. The unilateral decision to close St. Joseph Hospital does not appear to raise any antitrust issues. Likewise, based on the information available to us, Benedictine's decision to withdraw its financial support from some physicians practicing in the community and to provide financial assistance to other physicians, does not appear to violate Section 5.

For the purpose of this opinion, it is assumed that Benedictine itself is not and will not be a competitor in the physician services markets in question. Rather, it provides services in an adjacent market and is recruiting new physicians into the community in the hope of increasing demand for the hospital services that it provides. This does not appear either to involve an agreement that restrains competition unreasonably or to constitute monopolization of any market.

Your letter states that Benedictine has made a unilateral decision to offer free office space to the new physicians rather than to those already in the community. Therefore, the concerted action necessary for a Sherman Act Section 1 violation is lacking. In addition, the action does not appear to restrain competition in the market for physician services. While the free office space will clearly benefit one group of competitors, the physicians already in the community will continue to have privileges at St. Thomas More Hospital and will be able to continue to practice in the community.¹

Nor does it appear that Benedictine's conduct raises issues under a Sherman Act Section 2 analysis. As stated above, Benedictine does not appear to have an ownership interest in the physician practices in question, and is not a competitor in the physician services markets. Therefore, Benedictine does not appear to be attempting either to acquire market power in the

¹ Moreover, even if Benedictine entered into an agreement with the newly recruited physicians that only they could practice at the hospital the antitrust laws would not necessarily be violated; such an agreement would be effectively an exclusive contract, and such contracts are not per se illegal. See, e.g., Hyde v. Jefferson Parish Hospital Dist. No. 2, 466 U.S. 2 (1984); Burnham Hospital, 101 F.T.C. 991 (1983) (advisory opinion).

physicians services markets or to use whatever power it possesses in the hospital services market to gain power in the physician services markets.

The Commission has taken the position that a firm possessing monopoly power in one market may not discriminate unjustifiably among customers in an adjacent market who compete with one another, if the discrimination causes substantial injury to competition in the latter market. The Reuben H. Donnelley Corp., 95 F.T.C. 1 (1980), rev'd sub nom. Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1982); General Motors Corp., 99 F.T.C. 464 (1982). These cases were brought on the theory that a monopolist with control over a unique or essential facility cannot refuse, without a significant business justification, to deal with a portion of the class of person who have a commercial necessity to use that facility. However, Benedictine's conduct in this instance does not appear to violate the principles expressed in those cases.

First, it is not clear that Benedictine is in fact a monopolist in the hospital services market. While there are no other hospitals in Cannon City or Florence, those two communities are not far from Pueblo, whose hospitals may offer substantial competition to St. Thomas More at least with respect to some services. Second, none of the physicians is being denied access to the facility controlled by the possible monopolist -- the hospital -- and there is no reason to believe that the hospital controls all the rental space in the community suitable for medical offices. Third, Benedictine's proposed action would not appear to significantly injure competition in the physician services market. While receipt of free office space may confer on the favored physicians some competitive advantage, Benedictine's proposed action would result in new entry into the physician services market and provide consumers with additional choices. Furthermore, it would not have any directly exclusionary effects. Consequently, Benedictine's proposed action might enhance rather than suppress competition.

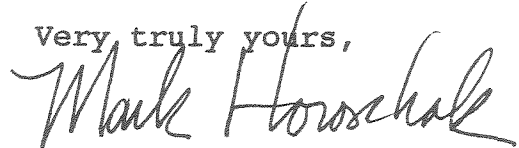
For the reasons discussed above, it does not appear likely that the conduct that Benedictine proposes to undertake would violate Section 5 of the Federal Trade Commission Act. Under the Commission's Rules of Practice §1.3(c), the Commission is not bound by this staff opinion and reserves that right to rescind it at a later time. In addition, this office retains the right to reconsider the questions involved and, with notice to the

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requesting party, to rescind or revoke the opinion if implementation of the proposed conduct results in substantial anticompetitive effects, if the conduct is motivated by an improper purpose, or if the public interest otherwise so requires.

Very truly yours,

A handwritten signature in cursive script that reads "Mark Horoschak". The signature is written in dark ink and is positioned above the typed name and title.

Mark J. Horoschak
Assistant Director