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

BUREAU OF COMPETITION

May 22, 1991

F. Tim Witsman
President
Wichita Area Chamber of Commerce
350 West Douglas Avenue
Wichita, Kansas 67202-2970

Dear Mr. Witsman:

This is in response to your recent letter addressed to Robert Walton, Executive Director of the Federal Trade Commission (the "Commission"). Your inquiry, which is being treated as a request for informal advice, expresses a concern about seemingly unnecessary duplication of health care services in the Wichita area and raises two general questions about the reach of the antitrust laws: first, whether the antitrust laws prohibit hospitals from meeting to collectively allocate services, equipment, or facilities among themselves; and second, whether such meetings would violate the antitrust laws if they were initiated and sponsored by an organization with wide community support. This response generally addresses your questions. We would be pleased to provide you with additional informal advice as you continue to explore possible ways of facilitating cost containment among members of the Wichita area heath care community.[1] I have asked Daniel J. Yakoubian, a senior attorney in our Health Care Division, to be prepared to discuss this matter further with you. He can be reached at (202) 326-2769.

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[1] From time to time, government-supervised planning has been suggested for the purpose of controlling costs and more efficiently allocating health care resources. In the past, federal legislation, the National Health Planning and Resources Development Act, Pub. L. No. 93-641 (1974), the "NHPRDA"), and related state legislation, provided for national and local community planning for health services, facilities, and equipment. As you may know, these planning efforts generally were found to be ineffective. Consequently, the NHPRDA was repealed and many associated state health planning initiatives have been repealed or greatly limited.

The principal federal antitrust law applicable to the health care industry is the Sherman Antitrust Act.[2] The Supreme Court has described the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources . . . . [T]he policy unequivocally laid down by the Act is competition." Northern Pacific Railway v. United States, 356 U.S. 1, 2-3 (1958). The Court has held that the Sherman Act prohibits agreements that "unreasonably" restrain competition. Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911). Agreements among or between competitors that do nothing more than raise prices or restrict output, are presumptively unreasonable and therefore are said to be per se illegal under the Sherman Act.

An agreement among competitors to divide or allocate markets -- whether on a geographic, customer, or product line basis -- is per se illegal under the Sherman Act. Such agreements have been held to be so inherently pernicious as to be condemned without even an inquiry into whether or to what extent competition is actually affected by them. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). This rule of per se illegality governs private agreements among hospitals or other health care providers to divide markets. For example, if two competing hospitals were to agree that one would exclusively offer radiation oncology services while the other would exclusively offer cardiac surgery services, such an agreement, without more, would be per se illegal, even though the hospitals might have sincerely believed that the elimination of their rivalry served the public good. The Supreme Court has made clear that the antitrust laws do not permit competitors to substitute their judgment as to what is good for consumers, for that of the marketplace. FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768 (1990); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

Per se condemnation can be avoided where competitors collaborate through a legitimate joint venture -- one in which the parties typically place at risk an appropriate capital investment or engage in other forms of efficiency-enhancing integration -- in order to create new products or services or

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[2] The Federal Trade Commission Act, which broadly prohibits "unfair methods of competition," incorporates the general prohibitions of the Sherman Act. See 15 U.S.C. § 45.

improve existing products or services. A joint venture, however, does not automatically pass muster under the antitrust laws; rather it is subject to the "rule of reason" standard, which requires the weighing of procompetitive benefits and anticompetitive effects of the venture, to determine its legality. See Broadcast Music, Inc. v. Columbia Broadcast Systems, Inc., 441 U.S. 1 (1979). Where competitors enter a joint venture, the purpose of which is procompetitive but which includes an ancillary provision that eliminates or limits some aspect of competition among the competitors, the venture will be held to be "reasonable" under the antitrust laws, and thus legal, if its overall effect is procompetitive.

The joint purchasing of sophisticated medical equipment, for example, may be subject to the rule of reason. Certain medical equipment requires a large capital outlay and a high level of utilization to reduce unit costs to a minimum. Where the demand for the services offered by such equipment in a local market is sufficient only to utilize one machine fully, efficiencies may be achieved and consumer welfare enhanced if several local providers form a joint venture to purchase that equipment and share its use and costs of operation. Such a venture would appear to have a procompetitive purpose -- it is intended to create efficiencies so that a service can be offered in the local market that otherwise would not be available. Nonetheless, to determine the venture's reasonableness, and hence lawfulness, under the antitrust laws, we would need to go further. We would ask whether the venture's restraints on the independent conduct of its participants are necessary to achieve the procompetitive objective. The guiding principle is that restraints imposed on the joint venturers should be no more restrictive on their ability to compete than is reasonably necessary to further the procompetitive objective of the venture. For example, an agreement among the venturers to allocate utilization of the jointly purchased equipment would seem reasonably necessary to ensure the effectiveness of the venture. By contrast, an agreement among the venturers to impose the same charges for use of the equipment would not appear to be reasonably necessary to accomplish the purpose of the venture. Such an agreement, standing alone, would be unlawful, and depending on the circumstances could invalidate the joint venture under the rule of reason.

There may be many opportunities for health care providers to joint venture in areas where limited coordination would be procompetitive and contribute to cost containment. Shared services and group purchasing can be appropriate areas for

joint ventures among or between competitors. Any proposed agreement among or between competitors to act jointly, however, should be reviewed by counsel experienced in antitrust matters to ensure that the goals of the venture are indeed procompetitive and the restraints sought to be imposed upon the venturers are reasonably necessary to accomplish those goals.

There is, of course, no antitrust proscription against the Chamber of Commerce, or any other community group, encouraging health care providers to decide individually to exercise restraint with respect to expenditures for costly equipment or services that may be unnecessary or duplicative. Furthermore, the antitrust laws do not categorically bar community representatives from exploring with local health care providers opportunities for procompetitive joint ventures. You should feel free to engage the health care community in discussions over what you perceive to be unnecessary and costly duplication. You should, however, be aware that the mere fact that the community business leaders support or participate in an agreement among health care providers to allocate resources or services will not immunize or protect the providers or other participants from liability for an otherwise illegal agreement in restraint of competition under the antitrust laws. See National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378 (1981).

I hope this discussion proves helpful to you. Please note, however, that as provided in Rule 1.3 of the Federal Trade Commission Rules of Practice, the Commission is not bound by this or other opinions rendered by the Commission's staff.

Thank you for your interest in the Federal Trade Commission.

Sincerely Yours,

Mark Horoschak

Mark J. Horoschak
Assistant Director

cc: Mary Lou Steptoe
James C. Egan, Jr.
Daniel J. Yakoubian

THE CHAMBER

November 7, 1990

Mr. Robert S. Walton
Executive Director
Federal Trade Commission
Sixth Street & Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Mr. Walton:

As a business community we are concerned with what we perceive to be unnecessary duplication of technology and services by our health care providers. The competitive forces in the health care industry create a proliferation of equipment and services that drive up the cost of health care. In the health care industry it appears that the balance between supply and demand does not reach an equilibrium, but that supply creates demand.

We have talked individually with our hospitals and other health care providers who tell us they are in jeopardy under the antitrust law if they meet cooperatively to discuss and act on duplication of services. They believe that even if a lower unit cost could be achieved by agreeing to allocate the purchase of technology or the delivery of services between different institutions, they are prohibited from doing this by antitrust laws.

This raises two questions. First, do the antitrust laws prohibit hospitals from meeting together to decide how the community could best be served by voluntary limits placed on services, medical equipment, or facilities? Second, if such meetings were initiated and sponsored by an organization with broad community participation, rather than by health care providers themselves, could providers then come together in this forum to discuss cooperative efforts to better serve community needs?

We are aware that one alternative would be to pursue legislative remedies but we wish to first examine whether any solutions are available to us under present law. Your prompt response to the above questions is appreciated.

Respectfully,

F. Tim Witsman

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President

Wichita Area Chamber of Commerce
350 West Douglas Avenue