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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

February 14, 2008

The Honorable William J. Seitz
Ohio Statehouse
Ground Floor, RM # 38
Columbus, OH 43215

Dear Senator Seitz:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] are pleased to respond to your request that we review and comment on the likely competitive effects of Ohio Executive Order 2007 – 23S (Executive Order or Order), which establishes collective bargaining for home health care workers. In your letter, you asked the Federal Trade Commission (FTC or Commission) whether the Executive Order is liable to create competition problems because it confers collective bargaining powers on some health care providers and not others, whether "the unionization of small business owners who contract with the state for provision of home health care services funded under the Medicaid program violates federal antitrust laws," and "whether the program established by the Executive Order is immune from the federal antitrust laws under either the 'state action' immunity doctrine" or federal labor law.[2]

The Executive Order provides for collective bargaining on behalf of all Independent Home Care Providers (IHCPs), "regarding reimbursement rates, benefits, and other terms."[3] In our judgment, such collective bargaining may raise the cost of home health care services, and reduce access to them. At the same time, collective bargaining is not likely to ensure better quality care as a countervailing benefit for health care consumers. For those reasons, the Commission has enforced the antitrust laws when certain private groups of health care providers have colluded to fix prices,

[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission (FTC or Commission) or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

[2] Letter from Rep. William J. Seitz, Ohio House of Representatives, to Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission (Sept. 24, 2007).

[3] Ohio Exec. Order 2007 – 23S, Establishing Collective Bargaining for Home Health Care Workers, 4 (July 17, 2007) (Executive Order), *available at* http://www.governor.ohio.gov/Portals/0/Executive%20Order%202007-23S.pdf.

and the Commission consistently has opposed legislative proposals to exempt from antitrust scrutiny various categories of health care providers. In fact, the Executive Order appears to require that private parties engage in conduct that normally would be deemed *per se* violations of federal antitrust law, including price fixing between competitors, unless protected by an immunity or exemption from antitrust scrutiny.

Interest and Experience of the Federal Trade Commission

Congress has charged the FTC with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[4] Pursuant to its statutory mandate, the Commission seeks to identify business practices and regulations that impede competition without offering countervailing benefits to consumers. For several decades, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of health care providers.[5] The FTC and its staff have issued studies and reports regarding various aspects of the health care industry,[6] and the Commission has brought numerous enforcement actions against entities in the industry that have violated federal antitrust laws.[7] In addition, the FTC and its staff have analyzed competition issues raised by proposed state and federal regulation of health care markets.[8]

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[4] Federal Trade Commission Act, 15 U.S.C. § 45.

[5] *See* Federal Trade Commission, *FTC Antitrust Actions in Health Care Services and Products*, *available at* http://www.ftc.gov/bc/hcupdate031024.pdf.

[6] *See, e.g.*, FEDERAL TRADE COMMISSION, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf; FEDERAL TRADE COMMISSION, THE STRENGTH OF COMPETITION IN THE SALE OF CONTACT LENSES: AN FTC STUDY (2005), *available at http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf*; FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004) (IMPROVING HEALTH CARE), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[7] *See, e.g.*, In the Matter of Colegio de Optometras de Puerto Rico, FTC File No.: 051 0044 (Sept. 11, 2007) (Decision and Order), *available at* http://www.ftc.gov/os/caselist/0510044/070730decision.pdf (price fixing and concerted refusal to deal with vision and health plans by optometrists); In the Matter of Advocate Health Partners, et al., FTC File No. 031-0021 (Dec. 29, 2006) (Agreement Containing Consent Order to Cease and Desist), *available at* http://www.ftc.gov/os/caselist/0310021/061229agree0310021.pdf (horizontal agreements to fix prices, engage in collective bargaining, and refuse to deal individually with health plans by competing independent physicians and physician practice groups accounting for over 2,900 physicians in Chicago metropolitan area).

[8] *See Prepared Statement of the Federal Trade Commission Concerning H.R. 971, "the Community Pharmacy Fairness Act of 2007," Before the Antitrust Task Force of the H. Comm. on the Judiciary*, 110th Cong. (Oct. 18, 2007), available at http://www.ftc.gov/os/testimony/P859910pharm.pdf (analyzing critically proposal to exempt non-publicly traded pharmacies from antitrust scrutiny); *see also* FTC Staff Comment to the Hon. Nelie Pou Concerning New Jersey A.B. A-310 to Regulate Contractual Relationships Between Pharmacy Benefit Managers and Health Benefit Plans (Apr. 2007), *available at* http://www.ftc.gov/opp/advocacy_date.shtm; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf.

More specifically, the FTC has focused on competition issues raised by collective bargaining by health care service providers. In addition to investigations conducted in the course of enforcement actions, there have been more general inquiries by the Commission and its staff into market issues pertinent to the Executive Order. For example, the FTC and the Department of Justice Antitrust Division (DOJ) jointly issued Health Care Statements dealing with, among other things, practitioner integration issues.[9] In 2003, FTC and DOJ considered diverse competition issues raised by health care markets in joint hearings.[10] Among the issues investigated in those hearings were the following: competition, regulation, and market entry issues for diverse health care professionals and para-professionals; unionization issues for health care service providers; professional vertical and horizontal integration issues; Medicaid and Medicare issues; and the impact of the state action doctrine on competition law and policy.[11] In 2004, the FTC and DOJ issued a report based on the hearings, a 2002 FTC-sponsored workshop, and independent research.[12]

In addition, the Commission's staff has conducted an in-depth review of the state action doctrine and has issued a report regarding the doctrine and its impact on competition in diverse markets.[13] FTC staff have presented testimony on the state action doctrine to the Antitrust Modernization Commission (AMC),[14] and FTC enforcement activities have been central to defining the scope of the doctrine.[15]

Discussion

A. The Executive Order Establishes Collective Bargaining for Certain Home Health Care Workers.

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[9] *See* STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 1996) (Health Care Statements), *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf. An application is discussed *infra*, at text accompanying notes 33-38.

[10] *See* Hearings on Health Care and Competition Law and Policy, June 26, 2003. An overview of the hearings, with links to agendas and supporting materials, including hearing transcripts and public comments, is available at http://www.ftc.gov/bc/healthcare/research/healthcarehearing.htm.

[11] *See id.*

[12] *See generally* IMPROVING HEALTH CARE, *supra* note 6.

[13] FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), *available at http://www.ftc.gov/os/2003/09/stateactionreport.pdf*; *cf.* FEDERAL TRADE COMMISSION, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE: AN FTC STAFF REPORT (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf (regarding scope of protection for anticompetitive conduct that petitions for government action).

[14] *See, e.g.*, Prepared Statement of Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission Before the Antitrust Modernization Commission, on the State Action Doctrine 2 (Sept. 29, 2005), *available at* http://www.ftc.gov/os/2005/09/050929antitrustmod.pdf.

[15] *See, e.g.*, Federal Trade Commission v. Ticor Title Ins. Co., 504 U.S. 621, 639-40 (1992) (upholding FTC determination that horizontal price fixing by rate regulation boards established by Montana and Wisconsin was not immune because they failed the "active supervision" requirement).

In July 2007, Ohio Governor Ted Strickland issued Executive Order 2007 – 23S, "Establishing Collective Bargaining for Home Health Care Workers."[16] The Executive Order seeks to establish collective bargaining for IHCPs, defined as "those providers of ongoing Medicaid reimbursed direct care services that are paid for through a Medicaid waiver program in the State of Ohio and not employed by a private agency."[17] The Executive Order stipulates state recognition of "one representative as the exclusive collective bargaining representative for all IHCPs."[18] Procedures for creating an "eligible voter list," certification and decertification of the exclusive bargaining representative, and bargaining between the state and the exclusive bargaining representative are also specified.[19] The Order also stipulates that "the State, acting throughout the Office of the Governor or his designee, shall engage in collective bargaining with the elected representative of IHCPs regarding reimbursement rates, benefits, and other terms."[20]

We note that the Executive Order states that collective bargaining should be undertaken "to ensure that the quality of services provided to in-home health care recipients remains constant,"[21] but that it contains no particular quality of care provisions.[22] We note, too, that the Executive Order specifies that, "the State intends that the 'State action exemption' to the application of the federal and state antitrust laws be fully available to the State, IHCPs, and their elected representative to the extent that their activities are authorized pursuant to this Executive Order."[23] At the same time, the Executive Order does not offer, and appears not to be accompanied by, any analysis of the state action doctrine or its potential application to the instant case.

B. The Contemplated Collective Bargaining Would Be Anticompetitive.

Since the advent of active antitrust enforcement in health care services markets, health care providers have sought antitrust exemptions in state and federal legislatures. Although varied in certain regards, such proposals have all, at bottom, sought protection from antitrust scrutiny for anticompetitive conduct that would tend to raise the prices of health care services without conferring countervailing benefits on health care consumers. Recognizing that many Americans face difficult health care choices in the market already, the FTC consistently has opposed such proposals. The Commission

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[16] Executive Order, *supra* note 3.

[17] *Id.* at 2.

[18] *Id.*

[19] *See id.* at 2-5.

[20] *Id.* at 4.

[21] *Id.* at 1.

[22] The Executive Order does observe that "the State retains its responsibilities … to take appropriate action when an IHCP fails to behave in a manner consistent with his or her provider agreement." *Id.* at 4.

[23] *Id.* at 5.

has enforced the antitrust laws when certain private groups of health care providers have colluded to fix prices,[24] and the Commission has opposed legislative proposals to exempt from antitrust scrutiny various categories of health care providers.[25]

In the FTC staff's judgment, the Executive Order raises the same sorts of competition concerns as have those cases and legislative proposals. As FTC staff explained in a 2002 letter to then-Representative Stapleton,

> There is widespread agreement among antitrust authorities that this type of naked horizontal price-fixing is among the most serious of competitive concerns, as such conduct predictably and consistently results in substantial consumer harm. . . . Without antitrust enforcement to block price fixing . . . we can expect prices for health care services to rise substantially. . . . For example, collective fee demands by pharmacists in the State of New York cost the state an estimated $7 million in increased health benefits expenditures for state employees. In other cases, the Commission accepted consent orders settling charges that physician collective bargaining forced health plans to raise their reimbursement rates - with the attendant risk of increases in premiums for policy holders - and state and local governments to raise . . . reimbursement levels . . . .[26]

The analysis is consistent across different types of health care service providers.[27] Just this year the AMC – the body created by Congress to evaluate the application of our nation's antitrust laws – addressed the subject of antitrust exemptions. The AMC urged Congress to exercise caution, pointing out that antitrust exemptions typically "create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a

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[24] *See, e.g.*, In the Matter of Colegio de Optometras de Puerto Rico, *supra* note 7 (price fixing and concerted refusal to deal with vision and health plans by optometrists); In the Matter of Advocate Health Partners, et al., *supra* note 7 (horizontal agreements to fix prices, engage in collective bargaining, and refuse to deal individually with health plans by competing independent physicians and physician practice groups accounting for over 2,900 physicians in Chicago metropolitan area).

[25] *See, e.g.*, Letter from Federal Trade Commission Staff to the Hon. Dennis Stapleton, Ohio House of Representatives (Oct. 16, 2002) (criticizing proposed antitrust exemption for health care providers), *available at* http://www.ftc.gov/os/2002/10/ohb325.htm; *see also Prepared Statement of the Federal Trade Commission Concerning H.R. 971*, *supra* note 8 (analyzing critically proposal to exempt non-publicly traded pharmacies from antitrust scrutiny); *Testimony of Robert Pitofsky, Chairman, Federal Trade Commission, on H.R. 1304, the "Quality Health-Care Coalition Act of 1999" Before the H. Comm. on the Judiciary*, 106th Cong. (June 22, 1999), *available at* http://www.ftc.gov/os/1999/06/healthcaretestimony.htm (regarding federal legislation that would have exempted all health care workers from antitrust scrutiny).

[26] Letter from Federal Trade Commission Staff to the Hon. Dennis Stapleton, *supra* note 25, at 2 (internal citations omitted). The magnitude of consumer harm – or potential consumer harm – can vary according to market size, market power, conduct, and other factors difficult to specify absent detailed analysis of particular markets. We note too that the Executive Order limits the power of the collective entity to strike, which may also be a factor.

[27] That is, the competition concerns are analogous across these various markets. *See id.*

large population of consumers through higher prices, reduced output, lower quality, and reduced innovation."[28]

Although the Executive Order only requires collective bargaining with the State itself, and only for services provided under Ohio's Medicaid waiver, Ohio consumers are not insulated from the effects of such collective bargaining. First, to the extent that the Executive Order raises reimbursement under the waiver, it raises the cost of a program supported by Ohio and federal taxpayers.[29] Second, the anti-consumer effects of the Executive Order are liable to spill over into other segments of the market for home health care services. Home health care services represent diverse medical and social support services billed to diverse payers.[30] Among the payers are private individuals who self-pay, private third-party payers, and public third party payers – including not just Medicaid but Medicare, the Veterans Administration, and others.[31] Although the Executive Order defines IHCPs as "those providers of ongoing Medicaid reimbursed direct care services that are paid for through a Medicaid waiver program in the State of Ohio and are not employed by a private agency,"[32] it does not define IHCPs as those who provide only such services and no others. Indeed, it may not be practicable to restrict such collective bargaining to service providers who deliver no professional services, and receive no reimbursement, except under the State's Medicaid waiver program. To that extent, there is a very real risk of unanticipated anticompetitive effects.

In brief, once IHCPs are organized – or combined – for the purpose of negotiating price and other terms with the State, there is a significant likelihood that such anticompetitive conduct will harm other payers beyond Medicaid.

C. Unless Shielded from Antitrust Scrutiny, the Private Conduct Contemplated in the Executive Order Would Violate Federal Antitrust Law.

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[28] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 335 (Apr. 2007) *available at* http://www.amc.gov/report_recommendation/toc.htm.

[29] Title XIX of the Social Security Act establishes the joint federal and state Medicaid program and sets forth terms for federal payments to the states. *See* 42 U.S.C. § 1396b (payments to the states).

[30] *See, e.g.*, *Home Health Care Overview*, Ohio State University Medical Center, *available at* http://medicalcenter.osu.edu/patientcare/healthcare_services/senior_health/home_healthcare_overview/. The Executive Order recognizes that there are home health care services that fall outside its terms, as well as providers who do not meet its definition of an IHCP. *See* Executive Order, *supra* note 3, at 2 (contemplating conditions under which state should consider expanding IHCP definition to include long-term personal care services and noting that IHCPs are only those providers "not employed by a private agency").

[31] *See, e.g.*, *Paying for Home Health and Hospice Care*, Ohio State University Medical Ctr, *available at* http://medicalcenter.osu.edu/patientcare/healthcare_services/senior_health/paying_for_home_health_hospice_care/.

[32] Executive Order, *supra* note 3, at 2.

Unless shielded from antitrust scrutiny by an exemption or immunity, the private conduct contemplated by the Executive Order would violate the antitrust laws. Specifically, the Order would permit competing providers to agree on the prices they would accept for their services, which constitutes *per se* illegal price fixing. The Health Care Statements issued by the FTC and DOJ address this issue directly.[33] In Example 3 of Statement 8, competing providers form a hypothetical independent practice association (IPA) to "combat the power" of managed care plans by negotiating with them collectively rather than individually.[34] The IPA involves no integration that is likely to result in significant efficiencies (*i.e.*, no financial risk sharing among the members; no indicia of clinical integration, such as joint development of protocols for improving care). In addition, as noted above, the Executive Order contains no particular quality of care provisions and makes reference to no particular means of ensuring the quality of care.[35] Collusion under these terms could, in fact, tend to reduce competition on qualitative aspects of home health care services. This combination – collective negotiation over price and no significant efficiency-enhancing integration – means that the agreement to bargain "will be treated as *per se* illegal price fixing."[36] In short, collective bargaining over prices is *per se* illegal price fixing[37] and is inconsistent with antitrust law and policy.[38]

D. The State Action Doctrine and Federal Labor Laws.

1. The State Action Doctrine: The Executive Order says that "[t]he State Action Doctrine Applies for the Purpose of Antitrust Laws."[39] The state action doctrine – first articulated by the Supreme Court in *Parker v. Brown*[40] – shields certain anticompetitive conduct by the states from federal antitrust scrutiny. Although a legal analysis of the state action doctrine, and its application to the Executive Order and private conduct related to the Executive Order, is beyond the scope of this letter, we

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[33] *See generally* HEALTH CARE STATEMENTS, *supra* note 9.

[34] Although the professional health care providers in the hypothetical are physicians, the antitrust analysis is the same.

[35] The Executive Order does observe that "the State retains its responsibilities … to take appropriate action when an IHCP fails to behave in a manner consistent with his or her provider agreement." Executive Order, *supra* note 3, at 4.

[36] HEALTH CARE STATEMENTS, *supra* note 9, at Example 3, Statement 8.

[37] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422 (1990).

[38] As the Supreme Court has observed, "The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *Ticor Title*, *supra* note 15, at 632 (citing United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)). We also note that, with reference to the spillover effects discussed above, such conduct may violate the antitrust laws independent of any explicit agreement to negotiate price with such payers. *See, e.g.* , United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966) ("it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy"); Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1000 (3d Cir. 1994); ES Dev., Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 553 (8th Cir. 1991).

[39] Executive Order, *supra* note 3, at 5.

[40] 317 U.S. 341 (1943).

note that it is settled law that states cannot immunize private anticompetitive conduct merely by stipulating the application of state action immunity.[41]

Parker represents the Court's reading of the preemptive reach of the Sherman Act,[42] a reading "grounded in principles of federalism."[43] In *Parker*, the Court found "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature."[44] Accordingly, the Court held that the Sherman Act does not prohibit state regulation that tends to suppress competition when "the state itself exercises its legislative authority" and, "as sovereign," adopts and enforces such regulation.[45] Notably, however, the Court has recognized that the principles of federalism underlying the state action doctrine are best served if *Parker* immunity is narrowly construed: "Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends."[46]

Under the state action doctrine, the conduct of the state, as sovereign, generally is immune from antitrust scrutiny. However, "[t]he national policy in favor of competition cannot be thwarted by casting … a gauzy cloak of state involvement over what is essentially a private price fixing arrangement."[47] Although states *themselves* may adopt and implement policies in tension with federal antitrust law, subordinate political entities, including state regulatory boards and municipalities, "are not beyond the reach of the antitrust laws because they are not themselves sovereign."[48] Private parties, moreover, are not insulated from antitrust scrutiny merely because a state legislature stipulates their immunity.[49] When a state expresses a policy to displace competition in favor of regulation, but delegates to private parties the implementation of that policy, *Parker* immunity requires establishing that the anticompetitive conduct

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[41] *See* text accompanying notes 46-54, *infra*, regarding certain state action doctrine limits. Analysis of the question whether the Order is preempted by the federal Social Security Act and its implementing regulations is also outside the scope of this letter.

[42] "We may assume also, without deciding, that congress could, in the exercise of its commerce power, prohibit a state from maintaining … [such a program] because of its effect on interstate commerce." Parker, 317 U.S. at 350.

[43] *Ticor Title*, *supra* note 15, at 633.

[44] *Parker*, 317 U.S. at 350-351.

[45] *Id.* at 352.

[46] *Ticor Title*, 504 U.S. at 636.

[47] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106 (1980).

[48] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985) (municipality not the sovereign); *see also* Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62-63 (1985) (state Public Service Commissions "acting alone" could not shield anticompetitive conduct from antitrust scrutiny); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975) (state bar association, which was state agency for certain purposes, not entitled to state action exemption).

[49] *Midcal*, 445 U.S. at 106 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.")

is sufficiently "the state's own."[50] Two tests are required for that purpose: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[51] Because "IHCPs are not State employees,"[52] collective bargaining by them or their privately elected representatives cannot be immune unless it passes both of these tests. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*,[53] California's system for wine pricing was not immune from antitrust scrutiny because the legislature itself did not establish prices, review the reasonableness of price schedules, or engage in any "pointed reexamination" of the program – hence, failing the active supervision test.[54]

2. Federal Labor Law Issues: The Executive Order seeks to confer antitrust immunity styled as a labor exemption. Although FTC staff is primarily concerned with the competition and antitrust law implications of the Executive Order, the staff does note that the Order appears entirely at odds with federal labor policy. The federal labor exemption is limited to the employer-employee context; it does not protect combinations of independent business people.[55] The Order, however, expressly excludes employees in favor of independent contractors,[56] inverting the distinction Congress drew between them. Unlike the labor law system, the Executive Order also lacks the exclusions from protected negotiations for subjects unrelated to the intended purpose of those laws, as well as the oversight of the process by the National Labor Relations Board.

Moreover, the creation of a labor exemption for home health care workers is offered as a remedy for problems that collective bargaining was never intended to address. The stated goal of the Executive Order is to "ensure that the quality of services provided to in-home health care recipients remains constant."[57] The labor exemption, however, was not created to ensure the safety or quality of products or services. Collective bargaining rights are designed to raise the incomes and improve

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[50] *Ticor Title*, 504 U.S. at 635.

[51] Midcal, 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

[52] Executive Order, *supra* note 3, at 4.

[53] *Supra* note 51.

[54] *Id.* at 105-106.

[55] *See, e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460 (1949); American Medical Ass'n v. United States, 317 U.S. 519, 533-36 (1943) (rejecting assertions that the labor exemption to the antitrust laws applied to joint efforts by independent physicians and their professional associations to boycott an HMO in order to force it to cease operating). NLRA Section 2 (3) gives the right to bargain collectively only to "employees." The 1947 Taft-Hartley amendments to the NLRA included a provision expressly stating that the term "employee" does not include "any individual having the status of an independent contractor." 29 U.S.C. § 152 (3).

[56] Executive Order, *supra* note 3, at 2.

[57] *Id.* at 1.

the working conditions of union members. The law protects, for example, the United Auto Workers' right to bargain for higher wages and better working conditions, but we do not rely on the union to bargain for safer, more reliable, or more fuel-efficient cars. Congress has addressed those concerns in other ways, as well as relying on competition among automobile manufacturers to encourage product improvements. The quality of home health care deserves serious consideration, but a labor exemption is ill-suited to the task.

In sum, the Executive Order is designed to confer a labor exemption on parties whose situations are very different from those eligible for the exemption under well-established principles of labor law. Instead, it would grant private independent contractors a broad immunity to present a "united front" when negotiating price and other terms in dealing with the State of Ohio and very likely other public and private payers.

Conclusions

Since the advent of active antitrust enforcement in health care services markets, health care providers have sought antitrust exemptions in state and federal legislatures. Although varied in certain regards, such proposals have all, at bottom, sought protection from antitrust scrutiny for anti-competitive conduct that would tend to raise the prices of health care services without conferring countervailing benefits on health care consumers. Recognizing that many Americans face hard health care choices in the market already, the FTC consistently has opposed such proposals.

In staff's judgment, the Executive Order raises the same competition concerns raised by those legislative proposals. Horizontal price fixing by independent health care providers tends to work to the substantial detriment of health care consumers and is inconsistent with federal antitrust law. Claims of immunity from antitrust scrutiny based on, for example, federal labor laws, are, in our judgment, problematic.

In brief, FTC staff is concerned that the Executive Order is likely to foster certain anticompetitive conduct that is inconsistent with federal antitrust law and policy, and that such conduct could work to the detriment of Ohio home health care consumers.

Respectfully submitted,

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