Statement

of

Peter J. Mandell, MD
Chair, Council on Advocacy
American Association of Orthopaedic Surgeons (AAOS)

on

Antitrust Laws and Their Effects on Healthcare Providers, Insurers and Patients

Presented to the
Committee on the Judiciary
The Subcommittee on Courts and Competition Policy
U.S. House of Representatives

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Good morning, Chairman Johnson, Ranking Member Coble, and other distinguished members of the subcommittee. I am Dr. Peter Mandell, Chair of the American Association of Orthopaedic Surgeons (AAOS) Council on Advocacy. I'm an orthopaedic surgeon in private practice on the San Francisco peninsula and have been doing that for over 35 years now. On behalf of the AAOS and my orthopaedic surgeon colleagues across the country, thank you for inviting our organization to testify before you today on the enforcement of antitrust laws against physicians by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).

Overview

Health insurance markets are highly concentrated and for the most part insurers possess market shares that are associated with monopsony power – the ability to present physicians with "take it or leave it" contracts that harm the quality and supply of physician services. Moreover, because health insurers are monopolists in the sale of insurance, they bear no loss of business consequence for the reduced physician services their beneficiaries endure.

The Quality Health Care Coalition Act, introduced by Congressman John Conyers and former Congressman Tom Campbell almost 12 years ago, would have leveled the playing field in the contract negotiations between physicians and insurers. AAOS continues to support this type of important legislation.

Physicians should be allowed to share information and negotiate collectively with health insurance plans. Right now the DOJ/FTC allow a restricted form bargaining called the third party messenger model. But this model has been used with only spotty success because it is labor intensive, cumbersome and costly to implement safely. It has also

proven an easy target for insurers and the DOJ/FTC have a low threshold for alleged physician 'collusion' and for initiating expensive antitrust investigation/litigation.

AAOS believes:

- The antitrust laws should be changed to allow physicians to collectively negotiate with health plans and insurers without necessarily joining a labor union; and

- The McCarran-Ferguson Act must be amended to change the anti-competitive practices of insurance companies and establish negotiating equity among health plans, insurers, and physicians.

AAOS also supports the AMA's position on Accountable Care Organizations (ACOs) and the enactment and promulgation of regulations to ensure physician's continued ability to provide quality patient care.

Background

The fact that health insurers possess monopsony power and that physicians are powerless in their negotiations with health plans should not be news to anyone. The AMA's study, *Competition in Health Insurance: A Comprehensive Study of U.S. Markets (2007),* reported that "unequivocally … physicians across the country have virtually no bargaining power with dominant health insurers and that those health insurers are in a position to exert monopsony power."[i] The 2009 AMA report found that in 18 of 42 states, the two largest insurers had a combined market share of 70 percent or more. In one year, the two largest insurers with a combined market share of 70 percent or more increased from 18 of 42 states to 24 of 43 states, according to the AMA's 2010 report.[ii] One other antitrust author noted that Blue Cross Blue Shield of Michigan has had "market dominance for decades."[iii]

Examples of Enforcement Against Physicians

Antitrust enforcement has been ineffective in halting health insurer market concentration. However, antitrust enforcement has had the effect of preventing physicians from jointly negotiating with insurers. In this way, antitrust enforcement has actually augmented the negotiating power of insurers, as was demonstrated in Delaware. [iv]

There, an insurance company mailed physicians a notice advising that if they failed to respond in 30 days, those physicians gave up the right to change the terms of the contract. While most physicians responded within the 30 days, several of my Delaware colleagues recall that the insurer instituted massive rate cuts anyway. Soon thereafter many physicians in Delaware, including most if not all of the 47 orthopaedic surgeons practicing in Delaware, dropped out of the plan.

The physicians negotiated with the insurer in good faith through the Federation of Physicians and Dentists, using the third party messenger model. The insurer reversed the cuts, but the physicians believe that the insurer then contacted the DOJ to make

allegations of antitrust violations. Approximately 80 subpoenas were issued and the Federation itself incurred $1.5M in legal fees. Depositions were taken in Florida, Ohio, Connecticut and Delaware. At least two of my colleagues believe that that their phones were electronically monitored throughout the process.

The end result was that the consent decree allowed the use of the third party messenger model anywhere in the U.S. but not in Delaware, and definitely not by the Federation for a period of five years. One of my colleagues lost his partnership in a practice. Another colleague was threatened with imprisonment by the DOJ. In his negotiations with the insurance plan, he found the third party messenger model to be wholly ineffective, as the insurance company refused to recognize it.

The most recent enforcement action occurred in Idaho this year, when the Idaho Orthopaedic Society, an orthopaedic practice group and five individual orthopaedic surgeons were charged with antitrust violations.[v] The action was resolved with a consent decree, after the defendants incurred more than $1M in legal fees and expenses. Several Idaho colleagues report that the final decree bears no resemblance to what actually happened in Idaho, which they find frustrating. For example, at no point during the investigation were the accused physicians interviewed or deposed.

Antitrust laws should send a clear message of what fair competition means. Instead, the message physicians hear loud and clear is the Hobson's choice of "Lie down and take the contract the insurance companies give you." If physicians object, they are exposed to charges of antitrust violations.

As practicing physicians, my colleagues and I can see the inequities of the current antitrust laws played out on an almost daily basis around the country. Particularly for solo practitioners like me, attempts to negotiate with insurance monopolies seem truly impossible.

Half a decade ago in California, Blue Cross joined with the State Compensation Insurance Fund to jointly control what was then about half of the Workers' Compensation market in the state, and a large portion of private group health coverage as well. The state workers' compensation fund forced physicians to contract with Blue Cross' networks, and in turn, Blue Cross forced those physicians to accept all of the plan's products or be dropped completely from its network of over 300 affiliates.

The combination of these two systems allowed Blue Cross of California to demand below cost reimbursements and to use their market power to artificially drive down rates. Physicians' actual cost of providing the care was not a consideration. California physicians brought this matter to the DOJ and FTC. They investigated but took no action.

Recommendations

AAOS supports legislation like the Quality Health Care Coalition Act of 2000, sponsored by Congressman Conyers and former Congressman Tom Campbell. Such an act would

extend to all health care professionals (not just physicians) the right to collectively negotiate with health insurance companies. These collective negotiation rights would not extend to Medicare, Medicaid, or to hospitals, and would not grant healthcare providers the right to strike. However, the right to collectively negotiate without the necessity of a union is essential.

AAOS also supports the American Medical Association's position on antitrust enforcement as it relates to Accountable Care Organizations (ACOs).[vi] As Cecil B. Wilson, MD, AMA President, explained last month at the FTC Antitrust Workshops, the American health care system has evolved far beyond the marketplace envisioned when the *Statements of Enforcement Policy in Health Care* were jointly developed by the DOJ and FTC in the 1990s.[vii] The current interpretation of our antitrust laws, enacted to protect the smaller competitor from the larger and stronger one, are now having the opposite effect, ultimately negatively impacting patient care. This climate presents multiple conflicts for the development of ACOs.

The AAOS supports the development of Accountable Care Organizations (ACOs), and the coordination of federal laws. As the FTC Workshops addressed, there are many statutes and regulations at play, including antitrust, Medicare and Medicare, anti-kickback, fraud and abuse, and Stark laws. The complexity of this issue, however, should not be a deterrent; the goal is a worthy one. "This is where the intersection between ACO formation, antitrust enforcement policy and the nation's fraud and abuse laws occurs and where legal barriers must be lifted," Dr. Wilson said. AAOS agrees with Dr. Wilson and supports the enactment of the necessary legislative and regulatory measures to ensure that physicians retain the ability to provide quality patient care.

Conclusion

The American Association of Orthopaedic Surgeons supports the Subcommittee's efforts to address the issue of equal enforcement of antitrust laws and their application to physician negotiations with health insurance plans. AAOS is pleased to have had the opportunity to share with you our thoughts, but more importantly, the experiences of our colleagues with DOJ and FTC antitrust enforcement actions. Maintaining quality patient care while ensuring fair competition in today's marketplace must be the ultimate goal.

On behalf of the AAOS, I would like to thank the Chair, the Ranking Member, and the entire subcommittee for your interest in and attention to this important issue facing America's patients and their physicians. We look forward to continuing to work with you on this matter.

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[i] American Medical Association, *Competition in Health insurance: A Comprehensive Study of U.S. Markets (2007)* at 5.

[ii] American Medical Association, *Competition in Health Insurance: A Comprehensive Study of U.S. Markets (2010).*

[iii] Robert W. McCann, *Field of Dreams: Dominant Health Plans and the Search for a "Level Playing Field,"* Health Law Handbook, p.42 (Thomson West 2007).

[iv] *USA v. Federation Of Physicians And Dentists, Inc.*, final Order available at http://www.justice.gov/atr/cases/f200600/200654.htm

[v] *USA and Idaho v. Idaho Orthopaedic Society, Idaho Sports Medicine Institute, Doerr, Hessing Kloss, Lamey, and Watkins*, final Order available at http://www.justice.gov/atr/cases/f262000/262061.htm

[vi] **Resolved**, that the American Association of Orthopaedic Surgeons shall work in concert with the American Medical Association and other appropriate organizations to promote legal mechanisms to allow physicians to engage in group negotiations with third party insurers. 2008 AAOS Resolutions, Collective Bargaining Issues, R1998B1, Adopted 1998; retained 2003 and 2008.

[vii] Cecil B. Wilson, MD, AMA President, Oct. 5, 2010, Workshop Regarding Accountable Care Organizations and Implications Regarding Antitrust, Physician Self-Referral, Anti-Kickback and Civil Monetary Penalty Laws, Baltimore, Md.