AAEM Policy Manual
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Antitrust Compliance Program

In recent years, the courts and the antitrust enforcement agencies have vigorously applied the federal and state antitrust laws to the healthcare industry. As a result of these recent developments, the board of directors of AAEM has established an Antitrust Compliance Program that will be overseen by the board of directors. The purpose of this program is to educate officers, directors, employees and member physicians acting on behalf of AAEM concerning antitrust risks, to encourage managers to seek appropriate counsel on business activities and to conduct those activities within the law, and to make certain that the Academy continues to be innovative and responsive to community needs and consumer demands in our marketplaces without inadvertently violating these laws.

Attached is a copy of the Antitrust Compliance Program. The board of directors will be responsible for implementing the program. One of the most important aspects of this program will be to continually educate all officers, directors, employees and physicians acting on behalf of AAEM about the antitrust laws. Please review and become familiar with the basic concepts of antitrust law outlined in the attached materials. The Antitrust Compliance Program will be useful, informative, and should help our managers fulfill their duties in full compliance with the antitrust laws. Please keep the Antitrust Compliance Program available for future reference.

Please contact me if you have any specific questions concerning the Antitrust Compliance Program or related antitrust issues. I appreciate your help and cooperation on this important matter.

Sincerely,

Dr. William T. Durkin, Jr., MD MBA FAAEM
President, AAEM

Board Resolution

WHEREAS, it is the policy of the board of directors ("Policy") of the American Academy of Emergency Medicine (AAEM) to require compliance with all provisions of the antitrust laws of the United States and in the state of Wisconsin, and to assure that the functions of AAEM are pursued in a manner consistent with the letter and spirit of the antitrust laws.

NOW, THEREFORE, BE IT RESOLVED that AAEM shall require all officers, directors, physicians acting on behalf of AAEM, and administrative personnel (hereinafter collectively referred to as "managers") whose job descriptions could involve situations in which opportunities to violate antitrust laws could arise, read AAEM's Antitrust Compliance Program and certify their intention to act in complete compliance with this Policy.

BE IT FURTHER RESOLVED that managers shall also be advised of the following:

1. No manager or agent has any authority to act contrary to the provisions of the Antitrust Compliance Program, or to authorize, direct or condone violations by any other manager.

2. No manager shall enter into any understanding, agreement, plan or conspiracy with any entity that limits or restricts competition with respect to prices, territories or service lines.

3. Any manager who has knowledge of facts or incidents which he or she believes may violate this Policy has an obligation, after learning of such facts or incidents, to promptly review the matter with the president of AAEM.

4. If a manager acting in good faith and upon advice of the president of AAEM nevertheless becomes involved in an antitrust proceeding, AAEM will assist such employee to the fullest extent permissible and appropriate.

5. Any manager who violates this Policy, or who orders or knowingly permits a subordinate to violate this Policy, shall be subject to appropriate disciplinary action according to the bylaws.

On behalf of AAEM, I certify that the within and foregoing Resolution was adopted by the board of directors at its meeting of **December 13, 2004**.

_____

(Responsible Official)

Antitrust Policy

I. POLICY

It is the policy of the American Academy of Emergency Medicine (AAEM) to comply with state and federal laws concerning antitrust and unfair competition. To that end, AAEM adopted an Antitrust Compliance Program in order to help provide that its officers, directors, employees and member physicians acting on behalf of AAEM comply with these laws. It is further the policy of AAEM that individuals whose positions may be impacted by the antitrust laws participate in educational programs sponsored by AAEM and certify their intention to comply with the Antitrust

Compliance Program.

A. Certificate of Antitrust Training

Each officer, director, employee or member physician acting on behalf of AAEM whose positions with AAEM may be impacted by the antitrust laws, or whose activities may subject AAEM or its representatives to legal liability for violations of antitrust laws, shall participate in educational programs in accordance with the AAEM Antitrust Compliance Program. Each such individual shall execute and file with AAEM a Certificate of Antitrust Training.

B. Certification of Compliance with Antitrust Compliance Policy.

Each officer, director, employee or member physician acting on behalf of AAEM shall, on an annual basis, certify his or her intention to comply with the AAEM Antitrust Compliance Policy by executing the Certification Form.

C. Failure to Comply with Policy

Officers, directors, employees or member physicians acting on behalf of AAEM who fail to comply with the Certification and documentation requirements set forth in this policy shall be subject to discipline as appropriate and in accordance with policies and procedures of AAEM.

Certification of Adherence to the AAEM Antitrust Compliance Policy

I certify that I have read and understood the American Academy of Emergency Medicine (AAEM) Antitrust Compliance Policy and have received specific educational training concerning the application of the Antitrust Compliance Policy and of the antitrust laws in general to my activities in my capacity with AAEM.

I hereby certify my intention to act in complete compliance with the AAEM Policy and, where necessary, seek advice from legal counsel concerning the appropriate activities that I may need to undertake in order to comply with such policy.

_____
Date

_____
Name

_____
Title or Capacity

American Academy of Emergency Medicine
Antitrust Compliance Program

I. Code of Conduct

PURPOSE

This Code of Conduct has been adopted by the American Academy of Emergency Medicine (AAEM) to provide standards by which all officers, directors, physicians acting on behalf of AAEM, and administrative personnel (hereinafter "managers") of AAEM will conduct themselves in order to protect and promote organization-wide integrity and to enhance AAEM's ability to achieve its mission.

INTRODUCTION

The Code of Conduct contains a *Principle* articulating the policy of AAEM and a *Standard* which is intended to provide additional guidance to persons functioning in managerial or administrative capacities. The Principle set forth in this Code of Conduct shall be distributed periodically to all managers. The Principle and Standard shall be distributed annually to directors, officers and selected physicians-members having administrative or managerial responsibilities. All managers are responsible to ensure that their behavior and activity are consistent with the Code of Conduct.

As used in this Code of Conduct, the term "AAEM" means AAEM and each of its divisions, subsidiaries and operating or business units. The terms "officer," "director," "employee," "administrative manager" and "physician" include any person who fills such a role or provides services on behalf of AAEM or any of its divisions, subsidiaries or business units.

Principle - Legal Compliance: **AAEM will strive to ensure all activity by or on behalf of the Academy is in compliance with applicable laws.**

The following Standard is intended to provide guidance to managers to assist them in their obligation to comply with applicable laws. This standard is neither exclusive nor complete. Managers are required to comply with all applicable laws, whether or not specifically addressed in these policies. If questions regarding the existence, interpretation or application of any law arise, they should be directed to the Board of Directors.

Standard - Antitrust: **All managers must comply with applicable antitrust and similar laws which regulate competition. Examples of conduct prohibited by the laws include: (1) agreements to fix prices, bid rigging and related activities intended to facilitate these practices; (2) boycotts, certain exclusive dealing and price discrimination agreements; and (3) unfair trade practices including bribery, misappropriation of trade secrets, deception, intimidation and similar unfair practices. Managers are expected to seek advice from the AAEM legal counsel when confronted with business decisions involving a risk of violation of the antitrust laws.**

II. Guidelines for Avoiding Violations of Antitrust Laws

By adhering to the following Guidelines, the chances of violating the antitrust laws can be decreased. These Guidelines, however, should not be viewed as providing an answer for all situations. Whenever a question arises concerning the propriety of a certain course of conduct, it is expected that AAEM's designated representative or legal counsel will be consulted.

A. General Guidelines

1. Don't discuss prices among competitors. This includes both the prices physicians charge for their services and the prices they pay for those services purchased in a competitive atmosphere.

2. Don't discuss division of markets or territories among competitors. This includes markets for patients as well as markets for physicians, nurses or technical employees who serve those patients to the benefit of any AAEM member.

3. Don't use one product or service as bait to sell something else.

4. Don't provide a forum for disparagement of a competitor's services unless the statements are true.

5. Don't make sales or purchases conditional on reciprocal purchases or sales.

6. Don't conduct meetings with members, who the government considers competitors, in which prices or any of the other foregoing subjects are discussed. Don't obtain information about competitors directly from those competitors. Don't agree with or attempt to coerce vendors, insurance companies or other payors with respect to their sale prices or terms and conditions of sale.

7. When purchasing goods, as opposed to services, don't accept discounts, rebates, or other price adjustments or discriminatory terms or conditions of sale without first checking with AAEM's representative or legal counsel to determine whether there is a legal basis for doing so.

B. Specific Guidelines Regarding AAEM's Function as a Medical Society

Whenever AAEM conducts meetings of its membership, whether it be an informal meeting or a general membership meeting, the potential for violating the antitrust laws increases significantly. For these reasons, when conducting such meetings, the following additional guidelines should be followed:

1. Participants shall not discuss at a membership meeting the following matters:
    - Prices or factors determinative of prices.
    - Costs.

- Profit levels.
- Credit terms.
- Allocation of territories among competitors.
- Allocation of customers among competitors.
- Refusal to deal with patients or suppliers.
- Limitation of services.

2. Additionally, the following characteristics or policies of a medical society, in some circumstances, increase the risks that the activities of the society may be alleged to be illegal by third parties, and shall be avoided:

    - Absence of a written policy of strict compliance with the antitrust laws.
    - Absence of an antitrust compliance program for the society's directors, officers, administrative directors or agents.
    - Adoption of standards that unfairly exclude members.
    - Adoption or maintenance of statistical or credit reporting programs.

3. Participants shall notify AAEM's designated representative or legal counsel when the proceedings of a meeting adopt or discuss the following subjects:

    - Restrictions on members dealing with, or competing with, anyone.

    - Restrictions on competitors or members participating in AAEM activities to the competitive detriment of competitors.

    - Restriction on dissemination of information to non-members of AAEM to the competitive detriment of non-members.

C. CONCLUSION

The standard of conduct for managers of AAEM under these Guidelines exceeds the minimal legal requirements of the antitrust laws. This standard of conduct is consistent with AAEM's policy to comply with the letter as well as the spirit of the antitrust laws. Only by becoming familiar with these antitrust laws and adhering strictly to the standard of conduct required by AAEM can we expect to avoid violating the antitrust laws and suffering the severe consequences which may follow. Each manager is encouraged to seek the advice of the AAEM designated representative or legal counsel concerning any questions about the antitrust laws or compliance with them or any other laws.

III. Antitrust Education

Basic antitrust education requires the following: AAEM should distribute the Antitrust Compliance Policy and a copy of the antitrust primer (Section VI *infra)* to all new managers. These new managers shall have the opportunity to direct questions regarding the Compliance Program to AAEM's designated representative or legal counsel. The managers should sign a certificate acknowledging that: (1) they received antitrust training; (2) they received a copy of the Antitrust

Compliance Policy and antitrust primer; and (3) they have read, understand and agree to abide by the Antitrust Compliance Policy.

Managers will receive, on an annual basis, an article which will update or supplement the antitrust primer (Section VI *infra*). Managers will certify that they read the annual article. In lieu of an article, the board may decide to view a videotape or invite a lecturer to a board meeting or the Scientific Assembly to provide the annual antitrust continuing education.

Intermediate antitrust education requires that AAEM:

(1) audit every area of activity that faces antitrust challenges;

(2) identify those areas of activity that have the greatest risk for antitrust problems, and prioritize those areas for training.

Advanced antitrust education involves a much larger time commitment. This shall occur if an audit or investigation reveals an area of possible violation of antitrust laws. Before a formal program is announced, the Antitrust Compliance Committee should carefully pick the educational tools that it feels comfortable using (slide shows, videos, testing, written/oral presentations, internal/external experts, etc.) and work them into a year-long, multiple-session training program. Once the training techniques are decided, the program can be designed around those choices.

On an ongoing basis, legal counsel will send managers legal updates on new antitrust cases or governmental agency pronouncements regarding the area of potential difficulty. Also, the board of directors should track managers' participation in antitrust training programs conducted either inside or outside AAEM. Managers should be encouraged to seek antitrust training at outside seminars and submit information from these seminars to the board of directors for dissemination to the membership. (Outside education should be counted towards the managers' required antitrust training hours per year.)

Finally, risk analyses on AAEM activities should occur when potential antitrust problems arise. These analyses should be conducted by legal counsel to protect the privileged nature of the discussions. The goal for these reviews should be to advise AAEM on how to minimize antitrust risks while simultaneously achieving the Academy's objectives.

Certification of Antitrust Training Program

I, _____, am affiliated with the American Academy of Emergency Medicine (AAEM) in the following capacity:

_____.

My signature below acknowledges that I:

___ read the antirust primer (Section VI *infra*)

___ read the annual update/supplement to the antitrust primer

_____

_____

_____
Signature

_____
Date

IV. Antitrust Auditing and Auditing Tools

An effective Antitrust Compliance Program requires that an organization exercise due diligence in trying to prevent and detect criminal conduct by its employees and other agents. One of the steps required to show due diligence is to have taken reasonable steps to achieve compliance with its standards.

Although the language of the Federal Sentencing Guidelines does not mandate an auditing or monitoring system, the related Application Note gives an example of "reasonable steps": "Utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees." This example involves a system for *affirmative* crime detection. It is suggested that while the scope and complexity of an audit system will vary with the organization, each organization should nonetheless develop a structured audit system.

A desirable audit system is one that monitors the operation of a compliance program, with the detection of crime as an important but secondary requirement. Accordingly, any monitoring or auditing system should review whether the compliance program is being followed. The audit system should assess the Academy's operational effectiveness of each of its own procedures.

There are at least three components to an effective monitoring and auditing program.

A. Inventory/Baseline

The first type of audit is one in which an inventory or baseline is obtained. This level of audit is designed to identify areas of potential concern within the Academy in which violations of antitrust laws are probable. Focus at this state of the overall auditing process should be upon identifying significant areas of exposure or non-compliance in the antitrust law. These baseline audits enable the Academy to identify areas of non-compliance and to develop general educational programs and specific remedies.

The AAEM board of directors completed a baseline review of its policies in 2005.

B. Periodic Audit

A second component of an effective audit program is a periodic audit process. This audit should occur once the potentially affected areas within the Academy are identified in order to assess current practices to ensure compliance with antitrust law. Any such practices should be reviewed to ensure that they comport with the monitoring and auditing program for the overall organization. The compliance officer will initially review new policies, review other policies when indicated and review all policies every three years. The compliance officer may request that other members of the board assist in this process. Any changes in policies will require board approval as described in the bylaws.

C. Complaint Review

AAEM members or any other individual may report perceived violations of the Antirust Compliance Program. These individuals may perceive violations from AAEM (1) policies, (2) publications, (3) subjects discussed at membership meetings, or (4) any other AAEM activity. These individuals may report perceived violations anonymously to info@aaem.org. Through its publications, AAEM will periodically inform its membership and other readers of their right to report perceived violations. AAEM will respond to legitimate complaints as per Section V *infra*.

V. Response to Non-Compliance

A. PURPOSE

This policy is intended to provide guidance to AAEM when a manager fails to comply with the Antitrust Compliance Program.

B. SCOPE

This policy applies to all AAEM managers.

C. PROVISIONS

AAEM members and other concerned individuals may report perceived violations of this Antitrust Compliance Program, as per Section IV, *supra*.

AAEM has implemented this Antitrust Compliance Program that, among other goals, is designed to detect and deter potential antitrust problems. The Academy requires that every manager adhere to the Antitrust Compliance Program. Managers who fail to do so shall be subject to action according to the bylaws.

Upon learning of possible misconduct by a manager relating to the Antitrust Compliance Program, the board of directors may request that legal counsel: (1) initiate a careful investigation into the matter; (2) prepare a report of its findings to the board of directors; and (3) recommend the appropriate action to be taken by the board of directors.

Depending on the misconduct at issue and all other relevant facts, disciplinary actions may include any or all of the following: (1) written warning; (2) suspension; (3) termination; and (4) voluntary disclosure to the appropriate state and/or federal governmental agency.

The types of misconduct that could result in disciplinary action include, but are not limited to, the following:

(1) failure to comply with AAEM's Antitrust Compliance Program;

(2) discussing prices with competitors;

(3) dividing markets with competitors;

(4) participating in agreements between competitors without authorization from the board of directors and/or legal counsel;

(5) participating in salary or price surveys without authorization from the board of directors and/or legal counsel;

(6) releasing confidential and/or proprietary trade information to third parties or competitors without authorization;

(7) failure to participate in antitrust training;

(8) failure to incorporate antitrust training into business practice; and

(9) other forms of misconduct determined by the board of directors.

After a disciplinary action is taken, legal counsel shall determine (1) if the Antitrust Compliance Program needs to be modified to prevent similar misconduct from recurring; and (2) whether the misconduct is of such a serious nature that AAEM needs to make a voluntary disclosure to the appropriate state and/or federal governmental agency.

VI. Substantive Overview of the Antitrust Laws

A. INTRODUCTION

During the first 85 years of antitrust law enforcement, it was widely believed that the antitrust laws did not apply to activities of healthcare institutions. The general consensus was that healthcare activities had no relationship to interstate commerce and that the healthcare industry was not subject to the antitrust laws because of its status as a "learned profession." Beginning in 1975, the United States Supreme Court ("Supreme Court") indicated, in a series of cases, that there was no exemption for the "learned professions" and that healthcare institutions were subject to antitrust laws in the same way as other industries.

In addition to legal clarification of the application of antitrust laws to the healthcare industry, other factors have created a new environment which fosters antitrust litigation involving healthcare institutions. These factors include the increase in the number of physicians, efforts by governmental officials and healthcare purchasers to "inject competition" into the healthcare delivery system as a means of reducing costs, the tendency to view healthcare as simply another type of "business" and the steady growth of managed care organizations. Given this trend, it is prudent that AAEM undertake preventative efforts to limit its exposure to legal liability for antitrust violations. Violations can result in criminal liability with maximum sentences of three years and $350,000 in fines for individuals, and $10,000,000 in fines for corporations. Alternatively, fines may be imposed amounting to as much as double the gain to the perpetrator or the loss to the victim. In addition, civil liability results in treble (i.e., three times) damages and attorneys' fees being awarded

to the injured party. Furthermore, even a prevailing defendant can be devastated by the cost of defense and the loss of time and talent to the Academy in defending an antitrust claim.

B. OVERVIEW OF THE ANTITRUST LAWS

1. Purpose of the Antitrust Laws

The purpose of the antitrust laws is to promote competition. The underlying political theory of the antitrust laws is that competition is good for business and good for consumers. The antitrust laws offer each enterprise an opportunity to compete on the basis of price, quality and service.

The premise of the antitrust laws is that free competition will yield the best allocation of economic resources, the lowest price and the highest quality products and services. Although some might question the validity of that premise, particularly as applied to healthcare services, only Congress and state legislators may grant exemptions. Good motives are generally not a defense for anti-competitive acts.

Although the antitrust laws impose important constraints, they also provide important benefits. By promoting a vigorous and price-competitive market, the antitrust laws reduce political pressure for more direct and heavy-handed regulation of healthcare providers.

Weak competitors often seek to use the antitrust laws as a shield against more efficient competitors. The antitrust laws were not intended, however, to protect inefficiency; their purpose is to assure consumers the benefits of competition, even if that causes injury to some competitors. Despite the limits imposed by antitrust laws, substantial opportunities remain for aggressive, innovative action.

2. The Sherman Act

The first antitrust statute, known as the Sherman Act, was adopted in 1890 and represented the culmination of decades of effort to preclude formation of monopolies and prevent the abuses of economic power that many had suffered. Although the social background and parts of the legislative history of the Sherman Act sometimes have been taken to indicate a narrow focus upon dealing with the relatively limited number of monopolies and economic abusers of that period, the language of the statute and the most likely rationale for its existence do not suggest such a narrow scope. The substantive language of the Sherman Act is contained primarily in the first two sections and it has remained unchanged since its adoption in 1890.

i. Sherman Act Section 1 - Agreements that Restrain Trade

In pertinent part, Section 1 of the Sherman Act provides that:

> *Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal*.

Certain features of Section 1 deserve special mention. First, the language is noteworthy for its breadth. If particular industries or types of trade were in the mind of Congress, those concerns did not reach the point of codification. The Sherman Act does not distinguish between industries that deal in products and those concerned with services. In fact, the breadth of the language has been said to give the Sherman Act a desirable constitutional sweep, and has enabled the courts to adapt it to new trades and arrangements as they become troublesome in the economy. The second noteworthy point is that Section 1 applies only to contracts, combinations and conspiracies. Consequently, it necessarily involves the joint conduct of multiple persons or at least multiple legal entities. A single provider acting individually cannot violate Section 1 of the Sherman Act.[1] However, it must not be overlooked that what may appear to be a single institution may in fact be comprised of multiple legal entities. This is particularly true for modern healthcare provider systems.[2] Where this is true, additional antitrust issues are raised.

Taken literally, the language of Section 1 of the Sherman Act could defeat the legality of virtually any contract or agreement, even those necessary for conducting simple business transactions. For a contract to be of value to one business, it must be to some extent in restraint of trade. For example, an employee who contracts to provide services to a particular employer is restricted in his or her ability to provide those same services, at the same time, to a competitor of the employer. Therefore, to avoid an absurd result, the courts have noted that the Sherman Act was not intended to prohibit all restraints necessary for the transaction of ordinary business. Instead, the courts have determined that the Sherman Act was intended to apply only to "unreasonable" restraints of trade.[3]

ii. Violations Under the "Rule of Reason"

In 1918, the Supreme Court explained the so-called "Rule of Reason," which is used to determine whether particular trade restraints are unreasonable within the intent of the Sherman Act.[4] The most often quoted statement of the test of the Rule of Reason was written by the Supreme Court in 1918, as follows:

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.*[5]

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1 *See* e.g. *Weiss v. York Hospital*, 745 F.2d 786 (2d Cir. 1984), *cert denied* 470 U.S. 1060 (1985).

2 A "parent" and its wholly-owned subsidiaries are viewed as a single economic entity under the antitrust laws and, therefore, is incapable of conspiring to violate Section 1 of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1989).

3 *Standard Oil Co. v. U.S.,* 221 U.S.1 (1911).

4 *Board of Trade of City of Chicago v. U.S.,* 246 U.S. 231 (1918).

5 *Id* at 238.

A rule described in terms as vague as these quite obviously leads litigants to present extensive factual proofs at trial which almost always require the use of economists and complex economic analysis of the industry and restraints in question. As a result, the trial of a major Rule of Reason case can be extensive, sometimes tying up courts for months and even years.

iii. Per Se Violations

It was perhaps predictable that courts have attempted to simplify the process. A judicial outgrowth of the complexity in applying the Rule of Reason in antitrust litigation is the development of the "Per Se Violation" doctrine. In essence, the Supreme Court has explained that certain trade restraints are inherently so unreasonable that the mere fact that the restraint exists is sufficient to demonstrate its illegality.[6] These restraints are referred to as being unreasonable and illegal in and of themselves or, as more popularly stated, are per se unreasonable and illegal.

The variety of arrangements and practices which may be determined to be unreasonable in general and therefore violations of the Rule of Reason are virtually unlimited and are hardly subject to consideration on a case-by-case basis. However, the types of restraints that are known as unlawful per se should become familiar to everyone so that issues and potential violations may be spotted at the earliest possible moment. The most common business practices in the healthcare field which have been found to be per se violations of the Sherman Act are as follows:

a. Price Fixing

The first, and often considered the most pernicious, per se violation of the Sherman Act is price fixing. Contrary to popular opinion, price fixing does not require an agreement to set a particular price among competitors. Rather, it refers to any agreement among competitors influencing the prices charged by those competitors. It may refer to the actual establishment of a common price, a system for setting prices,[7] or a system which merely establishes certain parameters (whether they be ceilings or floors) within which prices will tend to fall.[8]

Price fixing can also be demonstrated through the dissemination of guidelines for an industry, when the conduct of those industry members creates a reasonable inference of agreement to follow those guidelines.[9] The Supreme Court has explained that any combination that tampers with the price structure or pricing mechanism is unlawful, even absent an actual agreement on particular prices. Even where combinations only effectuated an agreement to fix prices at the going market rate, the combination and agreement has been held to be per se

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6 *Northern Pac. Rwy. Co. v. U.S.,* 356 U.S.1 (1958).

7 *U.S. v. Socony Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940).

8 *Arizona v. Maricopa County Med. Soc.,* 457 U.S. 332 (1982).

9 *Goldfarb v. Va. State Bar,* 421 U.S. 773 (1975).

unlawful.[10] Similarly, the contention that a particular agreement may have the effect of reducing rather than raising prices will not save the agreement from illegality.

The question of applying these traditional and extremely harsh price fixing rules to the healthcare industry has been one of recent publicity. The result was probably not surprising to seasoned antitrust practitioners when the Supreme Court held that traditional price fixing rules apply to the healthcare industry just as in any other industry.[11]

Additional forms of price fixing include "bid rigging" where, for example, competitors who are asked to submit competitive bids to buy or sell goods or services agree not to bid against each other, or agree on a system to pre-determine who the winner of the bidding will be. Separately, so-called "vertical price fixing" has been described by some courts to occur where a hospital attempts to control the price at which an independent contractor physician can sell his services to patients.[12]

b. Division of Markets

Another per se violation is that of division of markets. This violation relates to agreements among competitors to divide markets, generally referring to the allocation of certain markets to certain participants in the agreement. The evil to be avoided in this type of antitrust violation is the reduction or elimination of competition among competitors who use such an agreement, whether the agreement be implicit or explicit, to avoid all-out competition among themselves which would allow consumers to decide how to allocate market shares, rather than having competitors allocate those shares among themselves.

Examples of "division of markets" have historically included "gentlemen's agreements," by which competitors agree not to seek new customers in each other's primary geographic markets, or not to offer competing services.[13] Although health planning statutes previously gave healthcare providers certain limited defenses to authorized division of markets pursuant to valid health planning activities, this defense has now become much less viable.

c. Group Boycotts

The third per se violation is that of group boycotts. The group boycott or "concerted refusal to deal" has probably been the most frequently confronted

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10 *U.S. v. Socony Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940).

11 *Arizona v Maricopa County Med. Soc.,* 457 U.S. 332 (1982)

12 *Konik v. Champlain Valley Phys. Hosp. Med. Cen.,* 733 F.2d 1007 (2d Cir. 1984), *cert.denied* 469 U.S. 884 (1984).

13 *U.S. v. Topco Assoc., Inc.,* 405 U.S. 596 (1972).

antitrust problem within the healthcare industry.[14] The application of the per se illegality label to group boycotts has also been a troubled one. Even when the boycott operates to lower prices or temporarily stimulate competition, the boycott is per se illegal. Some courts have narrowed the per se illegality application of the group boycott rule to instances of horizontal exclusion of competitors by other competitors.[15]

Vertical boycotts conducted for reasons other than a direct attempt to restrain trade have been treated less harshly. This distinction can be very important to hospitals. Where, for example, a group of physicians attempts to exclude another physician from the medical staff, this is a horizontal group boycott and if there are no valid substantive reasons for the boycott, it will likely be treated as a per se violation. Where it is the hospital which chooses to refuse to deal with the subject physician, however, this is a vertical refusal and not a horizontal boycott. Although such conduct on the part of a hospital may fall within a Rule of Reason violation, it should not be treated as a per se illegal activity.

Where a hospital joins with others to boycott, for example, health maintenance organizations ("HMOs"), then the hospital is boycotting a competitor at the same level of the economy as the hospital itself, or engaging in a horizontal boycott. In this instance, unlike the refusal to deal with the physician who does not directly compete with the hospital, the refusal to deal with the HMO (when that refusal is part of the agreement with other horizontal competitors) can be expected to face per se illegality charges.

Where a decision not to deal with another person is not the result of an agreement among multiple entities, but is individually determined, this is not a concerted refusal to deal or group boycott. The Supreme Court has recognized the right of an individual to simply refuse to do business with another; as long as the refusal is not the result of a purpose to create or maintain a monopoly, then it should not violate the Sherman Act.[16]

While peer review activities have historically generated numerous allegations of group boycotts around the nation, the Healthcare Quality Improvement Act of 1986 ("HCQIA") now offers a certain amount of antitrust immunity for peer review activities carried out in conformance with the HCQIA. It is the policy of AAEM to conform to the HCQIA.

d. Tying Arrangements

The final per se violation is that of the tying arrangement. A tying arrangement simply refers to a situation in which a party agrees to sell a product or service only on the condition that the buyer also purchases a different product

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14 Thompson, *Antitrust and the Healthcare Provider,* Aspen System (1979) p. 9.

15 *Indiana Federation of Dentists v. F.T.C.,* 476 U.S. 447 (1986).

16 *U.S. v. Colgate & Co.,* 250 U.S. 300 (1919).

or service, or at least that the buyer agrees not to purchase that product or service from another supplier. In such an arrangement, the first product is referred to as the "tying product" and the second as the "tied product." Although the Supreme Court has referred to the tying arrangement as a per se violation, proof of the tying arrangement itself is not adequate to demonstrate that per se violation.[17] The test of legality requires each of the following elements:

1. Multiple Products or Services. The arrangement must involve two separate products or services, as opposed to a single product or service with definable but essentially separate subparts.

2. Market Power. The seller must enjoy sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. This test is currently interpreted to require a showing of power in the market for the tying product (functionally, the ability to actually coerce or force unwanted purchase of the tied product).

3. Interstate Commerce. A not insubstantial amount of interstate commerce must be affected by the arrangement.

Traditional tying concerns within the healthcare industry have involved such situations as shared service organizations that operate as group buying units. For example, where an organization does not allow members to participate in the buying function for one product unless they also purchase other products, a tying issue may be raised

Exclusive contracts are illegal only if they unreasonably restrain competition. Exclusive dealing is an unreasonable restraint of trade when a significant fraction of buyers or sellers are frozen out of the market by the exclusive deal.

iv. Sherman Act Section 2 - Monopolization

While Section 1 of the Sherman Act requires the joint conduct of multiple legal entities, generally through an agreement between various persons, Section 2 creates the possibility that the conduct of a single person or legal entity can also constitute an antitrust violation. Section 2 is directed explicitly at prohibiting monopolization, whether that monopolization is achieved by an individual or by a group; it also reaches attempted monopolization. The statute simply provides that every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign

[17] *Fortner Ent., Inc. v. U.S. Steel Corp.,* 394 U.S. 495 (1969); and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2 (1989).

nations shall be deemed guilty of a felony. That said, however, most Sherman Act Section 2 cases are considered to be civil, not criminal, violations.

The determination of illegal monopolization depends upon three elements:

a. Monopoly Power. An entity's possession of monopoly power in the relevant market.

b. Use of Power. An entity's acquisition or maintenance of this power by exclusionary or anti-competitive means or the use of the power for exclusionary or anti-competitive purposes.

c. Injury. Injury to another as a result of the monopoly power and exclusionary or anti-competitive conduct.

The definition of whether a particular entity has monopoly power with respect to any particular product or service also requires defining the market in which that monopoly power exists.

v. Sherman Act Concept of "Conspiracy"

Both Sections 1 and 2 of the Sherman Act mention the concept of a conspiracy leading to violation of those laws. It is best not to visualize the formal stereotyped conspiracy, where all of the members know exactly what they and each other are doing and have every intent of perpetrating illegalities. On the contrary, the type of conspiracy which can lead to Sherman Act and other antitrust violations does not require the formalities of the usual business agreement. Even criminal conduct in this context may be a matter of inference, deduced from the acts of the person accused. A tacit understanding created and executed by a long course of conduct is enough to constitute an agreement even without technical personal communication. Additionally, the form of the agreement is not critical. Proof of a conspiracy will ordinarily be circumstantial and therefore inferential.

Once a conspiracy has been established, only very slight evidence is needed to connect a particular participant. Even a single act may draw a defendant within the ambit of a conspiracy where the act is such that one may infer from it an intent to participate in the unlawful enterprise. Furthermore, participation in a conspiracy, whether it be a civil or a criminal conspiracy, need not be proved by direct evidence. A common purpose can be inferred from a development in the surrounding circumstances.

Because circumstantial and inferential evidence may demonstrate a conspiracy, AAEM must be cautious of any conduct which could be put together with market circumstances to create the implication of a conspiracy. The possibility exists that suggestions of groups, individual conduct, or even established and tacitly accepted practices may eventually become evidence used to demonstrate the existence of conspiracies to influence pricing mechanisms, divide markets, or commit other antitrust violations. Not only can such conspiracies lead to civil liability, they can lead to criminal penalties for both AAEM and individual AAEM managers.

Because of a 1989 Supreme Court decision, however, the various entities, such as sections and chapters that constitute AAEM cannot be guilty of conspiring among themselves.[18] The Supreme Court has explained that a parent corporation and its subsidiaries are treated as a single business unit. Consequently, decisions made among these entities are treated as the decision of a single person, rather than as an agreement among co-conspirators.

3. The Clayton Act

Additional antitrust statutes have been adopted since the Sherman Act, but none have any broader application than the Sherman Act. Some portions of these later antitrust statutes do, however, have particular importance for special types of transactions which may be relevant for AAEM. . For example, Section 7 of the Clayton Act prohibits a corporation from acquiring all or any part of the stock or assets of another corporation where the effect may be to "substantially lessen competition or tend to create a monopoly" in any geographic and product market. In this context, the terms "acquire" and "assets" have been given very expansive definitions, such that even the granting of licenses to distribute, exclusive marketing agreements, and the sale of subscriber lists have been regarded as acquisitions of assets for antitrust purposes. Consequently, mergers, shared services and other joint ventures, together with management contracts, can be treated essentially under the same "substantial lessening of competition" standard for antitrust analysis. All of these forms of consolidations lead to essentially the same issues. Where, for example, AAEM might contemplate acquiring another business entity or joint venturing with another enterprise, the application of Section 7 must be considered.

4. The Robinson-Patman Act

The Robinson-Patman Act, which is an amendment to Section 2 of the Clayton Act, prohibits offering or accepting discriminatory prices for like goods. Specifically, a seller violates the Act when it makes two contemporaneous sales of the same commodity to two different buyers at different prices, where the different prices have an effect on competition. Conversely, a buyer violates the Robinson-Patman Act when it knowingly induces or receives a discriminatory price for goods which are not also offered at the same price to other buyers. The purpose of the Robinson-Patman Act was originally to deal with perceived abuses by large buyers, particularly retail chain stores. These stores had been able to use their superior bargaining power to obtain price and price-related favorable discriminatory treatment from suppliers. Independent retailers complained that the chain stores were able to charge lower prices as a result of the unjustified concessions, making it impossible for the small buyer to compete.

The sale of commodities to charitable institutions, such as not-for-profit hospitals, are exempt from the proscription of the Robinson-Patman Act so long as the commodities are for a hospital's "own use." This "own use" restriction generally requires a hospital to refrain from reselling any commodity for which it has received a discriminatory price, except to certain limited persons.[19]

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[18] *Copperweld Corp. v. Independent Tube Corp., infra.*

[19] *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.,* 425 U.S. 1 (1976).

5. The Federal Trade Commission Act

The Federal Trade Commission Act is similar in impact to the Sherman Act and is broadly interpreted to include the principles of both the Sherman and the Clayton Acts. Generally, a violation of the Sherman Act will also constitute a violation under the Federal Trade Commission Act.

6. Consequences of Antitrust Violations

The penalties for violations of the antitrust laws can be severe. Violations of the Sherman Act can lead to both criminal and civil prosecutions, while most violations of the Clayton Act (other than certain portions of the Robinson-Patman Act) can result in civil prosecutions only. Violations of antitrust laws can be pursued by the United States Department of Justice, by the Federal Trade Commission, by states' Attorneys General, and, where authorities are delegated, by certain local government attorneys, as well as by private parties seeking damages. Additionally, not only is there a trend to prosecute an involved company, but also the employees who participated in the violation. Because of the severe consequences of a violation of the antitrust laws, it is imperative that each AAEM manager be fully aware of what conduct is prohibited and, when in doubt, seek advice of legal counsel before proceeding in an uncharted area.

7. Antitrust Defenses and Exemption

Over the years, the Supreme Court has steadily narrowed antitrust defenses and exemptions, subjecting more activity to antitrust scrutiny. Nevertheless, otherwise illegal conduct may be immunized if certain criteria are met. The following discussion focuses on the most important defenses; others may be available under limited circumstances.

i. State Action

Otherwise illegal private acts may be exempt from the federal antitrust laws if they are pursuant to a "clearly articulated and affirmatively expressed state policy," and the state "actively supervises" the conduct.[20]

The state need not compel the challenged conduct in order to immunize it. For this purpose, however, "state policy" must be articulated by an authoritative source. One Supreme Court decision[21] suggests that the policy must be established by the state legislature. For example, the "state action" exemption protects state hospital rate setting commissions from the antitrust laws because the state has substituted price regulation for price competition.

ii. Petitioning the Government

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20 *See, Patrick v. Burget,* 486 U.S. 94 (1988)

22 *Id.*

The antitrust laws do not prohibit competitors from cooperating in efforts to influence the government, even if their goal is to reduce competition. Competitors may jointly lobby the legislature to enact a statute, petition the executive to adopt certain policies, or initiate administrative and judicial proceedings. This judicially-created exception to the antitrust laws is designed to protect the right of private parties to petition the government and to promote the government's interest in the free flow of information.

How to Contact the Antitrust Division of the Department of Justice

You may contact the Antitrust Division regarding business review letters by writing or calling:

Legal Procedure Unit
Antitrust Division
U.S. Department of Justice
Suite 215, 325 7th St., NW
Washington, DC 20530
(202) 514-2481

You may access public documents by using the Internet:

gopher@justice.usdoj.gov
http://www.usdoj.gov

You may contact the Federal Trade Commission regarding advisory opinions by writing or calling:

Health Care Division
Bureau of Competition
Federal Trade Commission
Washington, DC 20580
(202) 326-2756

You may access public documents by using the Internet:

http://www.ftc.gov