Antitrust: Meetings To Discuss Prices LD 2136
5 MRSA §201 et seq
10 MRSA §1101

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Senator Olympia Snowe
Representative Harland C. Goodwin
Health and Institutional Services
State House
Augusta, Maine 04333

Dear Senator Snowe and Representative Goodwin:

You have asked for an Opinion of the Attorney General concerning antitrust problems connected with L.D. 2136, entitled the Health Facilities Information Disclosure Act. As is discussed in more detail in the appendix attached to this letter, L.D. 2136 contains two potentially serious antitrust problems. First, the Act encourages the exchange of price information between competitors, by permitting competing hospitals to submit price information for review and publication by a private organization (a voluntary budget review organization) which contains a representative from the hospital industry. Such an exchange of price information does not alone constitute a violation of antitrust laws. However, a violation will exist if hospital rates and charges stabilize at an uncompetitive level subsequent to review and publication of price information by a voluntary budget review organization. Second, L.D. 2136 creates a forum for price fixing by permitting the exchange of price information between competitors.

Industries, of course, do exist in which normal economic controls fail to secure an open and competitive market for goods and services. When such a situation arises, there may be a need for regulation of the industry. Courts, however, have made it clear that such regulatory activity will be immunized from antitrust liability only if that activity is controlled and dominated

by the State. Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Our economic system is based upon the premise that free and open competition will yield the greatest differentiation and quality of products at the lowest cost. Anticompetitive activity interferes with the normal economic process and, therefore, is presumed to be harmful to the public. If regulation is to replace competition, antitrust violations will be immunized only if the regulation is controlled by a politically responsive institution and will not be immunized if the regulation is controlled by the industry which stands to gain by uncompetitive practices. Cantor v. Detroit Edison Co., supra; Goldfarb v. Virginia Bar, supra.

The committee amendment to L.D. 2136 attempts to resolve these antitrust problems by exempting members of voluntary budget review organizations from liability under either of the two state antitrust laws. (the Unfair Trade Practices Law, 5 M.R.S.A. §206 et seq and the "State Sherman Act", 10 M.R.S.A. §1101). However, the exemption contained in §364-6 of committee amendment does not protect members of voluntary budget review organizations from antitrust liability. The federal antitrust laws, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, are not affected by §364-6 and, indeed, it is not within the State's power to prohibit private persons from enforcing federal antitrust laws. This fact is critical because the most likely source of legal challenge to members of a voluntary budget review organization arises from antitrust suits brought by hospitals, other health care organizations and consumers. Moreover, these plaintiffs may recover treble damages under federal antitrust laws. In addition, the Justice Department, the Federal Trade Commission and our office may continue to enforce federal antitrust laws if §364-6 of committee amendment is enacted.

Finally, as the public officer charged with overseeing the enforcement of the State's antitrust laws, I must question the wisdom of legislation which attempts to exempt members of

an industry from antitrust laws. Antitrust laws play a critical role in ensuring that our economy operates free of uncompetitive restraints. Indeed, Congress has recently reaffirmed the importance of antitrust enforcement by amending the federal antitrust laws to allow states attorneys general the power to enforce those laws. When an industry is permitted to regulate itself (as is permitted by L.D. 2136) all the greater reason exists for the application of antitrust laws in order to protect the consuming public from uncompetitive practices.

Sincerely,

Joseph E Brennan

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enc.

APPENDIX

STATUTORY FRAMEWORK

L.D. 2136

L.D. 2136, entitled the Health Facilities Information Disclosure Act, establishes a mechanism for review of

> the proposed budgets of any hospital by either the Health Facilities Cost Review Board of any approved voluntary budget review organization and for monitoring of any voluntary budget review organization [hereinafter cited as VBRO] by the Health Facilities Cost Review Board [hereinafter cited as the Board]. 22 MRSA §351

The Board is composed of designated State Officials and members appointed by the Governor. Pursuant to §359 the Board reviews and comments upon the reasonableness of the proposed budgets of all hospitals, except those hospitals which submit their budgets for review by an approved VBRO. The Board is authorized to approve VBRO's which (a) adopt procedures similar to those used by the Board, (b) publish their findings and recommendations, (c) file with the Board their findings concerning the review of rates and (d) are composed of an equal number of representatives from hospitals (under version No. 2 of L.D. 2136 the Maine Hospital Association approves one third of the membership of a VBRO), major third party purchasers and consumers. §364 Pursuant to version No. 2 of L.D. 2136, the Board reviews and comments upon the procedures adopted by VBRO's, and may withdraw its approval of a VBRO. Under both versions of L.D. 2136, VBROs review the budgets of hospitals in order to determine that the hospitals' prospective rates and charges are

reasonable.

The Applicable Antitrust Laws

Four major statutes, two federal and two state, prohibit the anti-competitive practices which this Opinion is concerned with. The Sherman Act, 15 U.S.C. §1, and 10 M.R.S.A. §1101 ("the State Sherman Act") prohibit contracts, combinations and conspiracies in restraint of trade. The Federal Trade Commission Act, 15 U.S.C. §45 et seq., and 5 M.R.S.A. §206 et seq., ("the mini-FTC Act") prohibit and provide for civil remedies against unfair methods of competition. Antitrust actions may be maintained under these statutes by the federal government (the Justice Department and the Federal Trade Commission), the State of Maine and private persons (under §4 of the Clayton Act, 15 U.S.C. §12 et seq.).

QUESTION 1(a):

Is a person in violation of state or federal antitrust laws if he or she is a member of a voluntary budget review organization approved under the version of 22 M.R.S.A. c. 105, §363 that appears in L.D. 2136 (hereinafter "version No. 1") and undertakes to accomplish such purposes as are enumerated in that version's §352(5)?

ANSWER 1(a):

A member of a VBRO does not violate state or federal antitrust laws merely by reviewing the reasonableness of hospital rates and charges pursuant to §359 and §364. However, if the rates and charges adopted by hospitals stabilize subsequent to review by a VBRO,

members of the VBRO may be subject to liability under antitrust laws.

QUESTION 1(b):

Is a person in violation of state or federal antitrust laws if he or she is a member of a voluntary budget review organization approved under the version of 22 MRSA c. 105, §364 that appears in the committee amendment proposed by the Maine Hospital Association (hereinafter "version No. 2"), a copy of which is attached hereto, and undertakes to accomplish such purposes as are enumerated in that version's §352(6)?

ANSWER 1(b)

Same answer as to Question 1(a).

QUESTION 2(a):

Is a hospital in violation of state or federal antitrust laws if it supplies to a voluntary budget review organization approved under version No. 1 the information required by that version's §358(4)(A)?

ANSWER 2(a):

A hospital does not violate state and federal antitrust laws merely by submitting financial information to a VBRO as required by §358. However, if the rates and charges adopted by the hospital

stabilize subsequent to review by a VBRO, the hospital may be subject to liability under antitrust laws.

QUESTION 2(b):

Is a hospital in violation of state or federal antitrust laws if it supplies to a voluntary budget review organization approved under version No. 2 the information required by that version's §358(4)(A)?

ANSWER 2(b):

Same answer as to Question 2(a).

QUESTION 3(a):

Is a Health Facilities Cost Review Board established under version No. 1 in violation of state or federal antitrust laws if the board establishes uniform systems of reporting under that version's §358 or reviews budgets under that version's §359?

ANSWER 3(a):

The Health Facilities Cost Review Board does not violate state or federal antitrust laws by implementing the commands of either §358 or §359.

QUESTION 3(b):

Is a Health Facilities Cost Review Board established under Version No. 2 in violation of state or federal antitrust laws if the board establishes uniform reporting requirements under that version's §358 or reviews budgets under that version's §359?

ANSWER 3(b):

Same answer as to Question 3(a).

REASONING:

In determining whether members of a VBRO, hospitals submitting to review by a VBRO, or the Board are liable under antitrust laws, two separate issues must be addressed: first, whether any of these parties are immune from antitrust liability and, second, if immunity does not exist, whether their activities engaged in pursuant to LD 2136 violate antitrust laws.

A. Immunity from Antitrust Law

1. Immunity of the Board

In 1943 the United States Supreme Court held that the Sherman Act does not apply to conduct of a state or of a state official. Parker v. Brown, 317 US 371 (1943). Under

both versions of LD 2136 the Health Facilities Cost Review Board is established as an independent state board and, therefore, is immune from antitrust liability under the holding of Parker. The members of the Board, who are compensated by the State, are either appointed by the Governor or are designated state officials. §358 and §354. The Board may appoint an executive director paid by the State. §355. Finally, both bills appropriate $50,000 to the Board from the State's General Fund. The Board is a State entity and, thus, may claim immunity from antitrust liability.

2. Immunity of the Members of a VBRO

Recently the Supreme Court has addressed a more complex issue than that raised in the Parker decision: whether private citizens are immune from antitrust liability when they act either in concert with state officials or pursuant to a state regulatory scheme. In the leading case of Goldfarb v. Virginia State Bar, 421 US 773 (1975), the Supreme Court held that a county bar association which promulgated a minimum fee schedule for lawyers and the state bar association which approved the fee schedule and represented that it would enforce the schedule, violated the Sherman Act. In rejecting the claim that defendants were immune from antitrust liability the Court concluded that immunity arises only when the anticompetitive "activity is required by the State

acting as sovereign." (emphasis added) 421 U.S. 773, at 770. The relevant Virginia statutes did not require fee schedules but, rather, authorized the state Supreme Court to regulate lawyers. The Virginia Supreme Court mentioned advisory fee schedules in its ethical codes, but it did not require bar associations to supply fee schedules. Although the conduct of the State bar association (which constituted a state agency for some purposes) in approving the fee schedule was "prompted" by the Virginia Supreme Court's ethical codes, such state prompting was not sufficient to immunize the association from antitrust liability. "[R]ather, anticompetitive activities must be compelled by direction of the State" for immunity to arise. 421 U.S. 773, at 791 (emphasis added).

One year later, in Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110 (1976), the Supreme Court further clarified the application of state immunity to private persons. Detroit Edison Co., a private electrical utility, provided its residential customers with light bulbs at no additional cost. The Michigan Public Service Commission approved a tariff filed by Detroit Edison which set forth the utility's light bulb program. In an action under the Sherman Act, a retail seller of light bulbs alleged that Detroit Edison's light bulb program illegally restrained competition. In concluding that Detroit Edison was not immune from antitrust liability, the Court reasoned that private citizens

should be liable for anticompetitive conduct except when

> the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct implementing it.... 48 U.S. 579, at , 96 S. Ct. 3110, at 3119.

The members of a VBRO (under either version of LD 2136) are not immune from antitrust liability under the Parker doctrine. A VBRO is not a State entity and the members of a VBRO are not state officials. In Goldfarb, the Supreme Court concluded that the state bar association, which was a state agency, could not be immunized from antitrust liability unless its anticompetitive activities were compelled by the State. Certainly a VBRO, which is not a State agency or board, must meet the stricter tests required by Goldfarb and Cantor, rather than the blanket state immunity offered by Parker.

Members of a VBRO cannot claim immunity under Goldfarb because their activities are not compelled by state law. As in Goldfarb, the State merely prompts the formation of VBROs. VBROs are voluntary organization which private persons are authorized to establish in order to provide an alternative to budget review by the state board.

Finally, applying the approach suggested in Cantor, the State's participation in the decisions of VBROs is not "so dominant that it would be unfair to" apply antitrust laws to those decisions. Purusant to version No. 1 of LD 2136 the Board

approves VBROs which have adopted procedures similar to those used by the Board and establishes standards for approval of VBROs. The Board, however, has no review or approval power with respect to the budget reviews undertaken by a VBRO. The State's participation in the decision making of a VBRO is minimal.

Under version No. 2 the Board exercises somewhat greater control over VBROs. However, although the Board reviews and comments on the procedures adopted by a VBRO and may withdraw approval of a VBRO, the Board does not review or approve the specific findings and recommendations of a VBRO. Thus, even under version No. 2 the State does not play a dominant role in the VBRO's activities. Because VBROs are voluntary private organizations subject to minimal state control they are not entitled to antitrust immunity under Cantor.

The Supreme Court in Eastern Railroads Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), developed another doctrine of immunity from antitrust laws. In Noerr, trucking companies and trucking associations alleged that certain railroads conspired to monopolize the long haul freight business through use of a publicity campaign designed to (a) create public dislike of truckers, (b) encourage enactment of anti-trucking legislation, and (c) impair relations between truckers and their

customers. The Supreme Court concluded that political activity designed "to influence the passage or enforcement of laws" was immune from antitrust liability. 365 U.S. 127, at 135.* Noerr, however, and the subsequent Supreme Court cases interpreting Noerr, dealt only with solicitation of government action. In Cantor, the Court found that Noerr "did not involve any question of liability or exemption for private action taken in compliance with state law," 428 U.S. 579, at , 96 C. Ct. 3110 at 3122, and, thus, concluded that Noerr was not applicable. Similarly, the members of a VBRO, under either version of LD 2136, are not involved in solicitation of government action and, thus, Noerr does not apply here.

3. Immunity of Hospitals Submitting to Review by a VBRO

A hospital which decides to submit to review by a VBRO is not immune from antitrust liability under any of the doctrines developed by the Supreme Court. Although hospitals may be required to submit information to the Board, submission of information to a VBRO is optional and voluntary under §359-1 of either version of the bill. Because a hospital is not compelled to submit information to a VBRO, a hospital cannot

*In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Court construed Noerr as applying even if defendants intended to restrain competition. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court extended Noerr to encompass solicitations to administrative agencies as well as to legislatures and courts.

claim exemption under the reasoning of Goldfarb. Additionally, the State has an extremely limited role in the review process of a VBRO. Thus, hospitals are not immune by virtue of Cantor. Finally, because hospitals submitting to budget review by a VBRO are not soliciting governmental action, Noerr is not applicable.

B. Antitrust Liability of the Members of VBROs and of Hospitals for Engaging in Activities Pursuant to LD 2136

The Supreme Court has held that the concerted exchange of price information between competitors constitutes a combination or conspiracy under the §1 of the Sherman Act. United States v. Container Corp. of America, 393 U.S. 333 (1969). Moreover, the Sherman Act will be violated if the exchange of price information results in an anticompetitive effect on prices. 16J Van Kalinowski, Business Organizations, §77.02 [2a] (1977).*

Pursuant to both versions of LD 2136 hospitals voluntarily submit financial information to a VBRO. The VBRO reviews the budgets of hospitals to determine the reasonableness of the hospitals' prospective rates and charges. Subsequent to its review of the financial information submitted by hospitals, the VBRO must publish its findings

*In United States v. Container Corp. of America, 393 U.S. 333 (1969), the Supreme Court apparently held that when competitors exchange price information in an oligopolistic market, in which the products are fungible and the demand inelastic, antitrust laws are violated without requiring proof of an anticompetitive effect on prices. See Associated Radio Service Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1093 (N.D. Tex. 1976).

and recommendations concerning the reasonableness of hospital rates and charges. This statutory scheme is one which both members of VBROs and hospitals can reasonably expect to result in the exchange of price information.

Cases involving illegal exchange of price information normally involve the direct exchange between competitors. However, the exchange of price information by or through a third party may constitute a violation of the Sherman Act. For example, the exchange of price information by or through a trade or professional association may give rise to antitrust liability. See American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); In re Medical Service Corp., File No. 761-0051 (FTC consent decree prohibiting medical association from developing relative value scales for medical services); United States v. Illinois Podiatry Society, Inc., Civil Action No. 77-C-501 (N.D. Ill. December, 1977) (Justice Department final judgment prohibiting podiatry society from developing relative value scales for services). Because the membership of a VBRO includes representatives from a hospital or approved by the Maine Hospital Association, VBROs are closely connected with the hospital industry itself. The hospital member of a VBRO, by performing his or her duties in the receipt, review and publication of price information, will have joined a conspiracy to exchange price information with competing hospitals. Moreover, because both the Sherman Act and 10 MRSA §1101 prohibits conspiracies, the consumer and third

party purchaser members of a VBRO will incur liability for joining the conspiracy between the hospital member of the VBRO and the competing hospitals. A defendant may be guilty of conspiracy under the Sherman Act even if he or she is incapable of committing the substantive offense. See United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 224-25, 259 (1940).

At this juncture it is not possible to determine whether the exchange of price information by hospitals and members of a VBRO will result in an anticompetitive effect on prices. However, as the Container decision makes clear, the concerted exchange or price by hospitals and members of a VBRO constitutes a conspiracy under §1 of the Sherman Act. Thus, if hospital rates and charges stablilize subsequent to the publication of information by a VBRO, then both the members of the VBRO and the hospitals which submit to budgetary review by the VBRO will be open to antitrust liability.

Finally, it should be stressed that LD 2136, by authorizing the hospital industry to review its own pricing structure may facilitate price fixing. If members of VBROs and hospitals enter into an agreement to fix or stabilize price, they will be liable under antitrust laws without proof of a resulting anticompetitive effect on prices.