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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 22, 1978

Representative Harland Goodwin
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Goodwin:

On March 13, 1978, this office issued an Opinion (at the request of you and Senator Snowe) concerning the antitrust problems connected with L.D. 2136, entitled the Health Facilities Information Disclosure Act. Subsequent to the issuance of that Opinion, the Committee on Health and Institutional Services has proposed two amendments to L.D. 2136 (Committee Amendment A as amended by House Amendment ___, and Committee Amendment B). In light of these proposed amendments, you have asked the following question: which of the amended versions creates a greater risk of antitrust liability for either the members of voluntary budget review organizations or hospitals submitting budgets for review by such voluntary organizations. As the discussion to follow demonstrates, Committee Amendment B creates a far greater risk of antitrust liability than does Committee Amendment A as amended by House Amendment ___.

As was discussed in the earlier Opinion, the liability of private persons under antitrust laws for anticompetitive activity depends in part upon the extent of the state's control of or participation in that activity. In Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110 (1976), the United States Supreme Court concluded that private

citizens should be immune from antitrust liability only 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.... 428 U.S. 579, at , 96 S. Ct. 3110, at 3119.*

It should be noted, however, that in Goldfarb v. Virginia State Bar, 421, U.S. 773 (1975), the Supreme Court concluded that private persons are immune from antitrust liability only when anticompetitive activity is compelled by the state. At least one federal district court has argued that the Goldfarb test is a threshhold test, and that a private person can never be immune from liability unless the anticompetitive activity is required by the state. Surety Title Insurance Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977).

The committee amendments to L.D. 2136 alter the degree of state control over the activities of the voluntary organizations. Committee Amendment A, as amended by House Amendment ___, authorizes the state board to approve voluntary organizations which adopt procedures for reviewing budgets and for filing and analyzing financial information

*In the original version of L.D. 2136 the state board was authorized to approve voluntary organizations which hadadopted procedures "substantially equivalent" to those adopted by the state board itself. This office concluded in the March 13th Opinion, that the state board's participation in the decisions of voluntary organizations was not "dominant", because the board had no authority to review or approve the budget recommendations of voluntary organizations. Therefore, applying the Supreme Court's reasoning in Cantor, neither the members of voluntary organizations nor hospitals submitting budgets for review are immune from antitrust liability. Pursuant to version No. 2 of L.D. 2136 (discussed in the March 13 Opinion) the state board lacked any control over the procedures adopted by voluntary organizations. The state board, however, was empowered to withdraw approval of any voluntary organization which did not meet certain minimal standards. Clearly under version No. 2 voluntary organizations were subject to only minimal state control and, thus, were not entitled to immunity under Cantor.

if those procedures permit the voluntary organizations to carry out their statutorily defined duties. The state board is also authorized to withdraw approval of any voluntary organization when the organization's procedures do not fulfill the criteria set forth in the proceeding sentence and when the hospitals submitting budgets to the organization incur cost changes in excess of the performance standards established by the state board. Committee Amendment B authorizes the state board to review and comment on the procedures adopted by the voluntary organizations. The state board, however, is empowered to withdraw approval of any voluntary organization which either fails to meet the performance standards developed by the board or fails to adopt procedures which will result in fulfilling those standards.

Under either of the committee amendments, the state board lacks authority to review or approve the specific budget recommendations of voluntary organizations. However, pursuant to both amended versions the state board may withdraw approval of any voluntary organization which fails to stabilize hospital costs in line with the performance standards developed by the state board. Thus, although the state board is not empowered to approve the specific budget recommendations of the voluntary organization, the board is empowered to evaluate the impact of the organization's budget recommendations on hospitals submitting to budget review. This retrospective control over the activities of the voluntary organization substantially increases the state's control as compared with either version of L.D. 2136 discussed in the March 13, 1978 Opinion.

Pursuant to Committee Amendment B the state board has no prospective control over the procedures of the voluntary organization. Committee Amendment A, however, authorizes the board to approve the voluntary organization's procedures if those procedures ensure that the organization can meet its statutory duty to determine the reasonableness of prospective rates and charges. Committee Amendment A thus authorizes the state to exercise a greater degree of control over the activities of the voluntary board than does Amendment B.

Courts have not fully delineated what degree of state supervision of anticompetitive decision making by private parties will immunize those parties from antitrust liability. However, it is clear that Committee Amendment A, by authorizing the state board to both approve

the procedures of the voluntary organization and to withdraw approval of organizations which fail to meet state mandated performance standards, provides far greater state supervision of the voluntary organization than does Committee Amendment B. It is possible that courts will not immunize private anticompetitive activity unless that activity is compelled by the state. See Goldfarb v. Virginia State Bar, supra; Surety Title Insurance Agency, Inc. v. Virginia State Bar, supra. Neither of the committee amendments meets the Goldfarb test because neither version requires the voluntary organization to engage in anticompetitive activity. However, if the Supreme Court's decision in Cantor is applied independently of Goldfarb, then Committee Amendment A is far more likely to result in immunizing the acitivity of the voluntary organization than is Committee Amendment B.*

Sincerely,

Stephen L Wessler

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*Committee Amendment B contains an exemption from state antitrust laws for voluntary organizations and hospitals. In the March 13th Opinion this office pointed out that such an exemption would be ineffective because the exemption would not effect the federal antitrust remedies. Finally, such an exemption may lead hospitals to the erroneous belief that they are immune from all antitrust liability for activities related to the review of budgets. Because hospitals can be sued by both private parties and governmental entities under federal antitrust laws the erroneous assumption that a state antitrust exemption is all inclusive may place hospitals in serious jeopardy.