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Applying Section 1 To Hospital Peer Review Decisions

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Decisions to grant or terminate a doctor's privileges to practice medicine at a particular hospital are often made through a peer review process by a hospital and its staff doctors. Generally, a doctor can admit and treat patients only at hospitals where the doctor has staff privileges. The peer review process can have a significant economic impact on a doctor's practice for a number of reasons including a limited number of hospitals in a particular market, a limited number that will accommodate a doctor's practice area and the stigma in the medical community of a denial of staff privileges.

Given the economic significance of these peer review decisions, it is not surprising that some doctors who have been denied hospital privileges have sued the denying hospital and its reviewing doctors. A number of the lawsuits have alleged violations of Section 1 of the Sherman Act (the "Act"), 15 U.S.C. § 1 (2000), and sought treble damages. The Section 1 claims typically allege that the hospital and reviewing doctors made decisions to further one or more of their own economic interests, rather than on the merits of the plaintiff doctors' medical skills. The peer review process is vulnerable to such claims because some of the reviewing doctors are often from the same practice areas as the plaintiff, since they are most able to offer particular expertise in the plaintiff's area of specialty.

Section 1 Requires More Than One Actor

Section 1 prohibits any contract, combination or conspiracy in restraint of trade or commerce among the several States. Accordingly, a plaintiff claiming a Section 1 violation must first establish concerted action between two or more entities. A single entity's unilateral actions do not give rise to antitrust liability under Section 1 of the Act.

The Act does not direct itself against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. Section 1 treats "concerted behavior more strictly than unilateral behavior" because "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).

Circuits Holding a Hospital and Its Staff Are One Entity

Courts appear to be in agreement that doctors are independent entities who can conspire with each other for antitrust purposes. *See, e.g.*, *Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal.*, No. CV F 09-1273 LJO GSA, 2010 U.S. Dist. LEXIS 36694, at *14-16 (E.D. Cal. Apr. 14, 2010). The focus of this article is on whether doctors can conspire with a *hospital* under Section 1 of the Act. Two lines of case law have developed. The Third, Fourth and Sixth Circuit Courts of Appeal have held that a hospital cannot conspire with its medical staff during the peer review process for purposes of Section 1 liability. *See, e.g.*, *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 614 (6th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991); *Weiss v. York Hosp.*, 745 F.2d 786, 813-17

(3d Cir. 1984). These cases reason that a hospital and its medical staff are not separate economic entities for purposes of Section 1 because the medical staff, even if not employed by the hospital, act as agents for the hospital during the peer review process. *See, e.g.*, *Oksanen*, 945 F.2d at 703. In *Weiss*, the plaintiff osteopath alleged, among other things, that defendant hospital and staff conspired to deny him hospital privileges in violation of Section 1 because of his status as an osteopath. 745 F.2d at 791-92. At trial, the District Court instructed the jury that the hospital and its staff are a single entity "which cannot conspire with itself." *Id.* at 816. Plaintiff appealed this instruction. The Third Circuit held that the jury instruction was proper, reasoning that the "medical staff was empowered to make staff privilege decisions on behalf of the hospital" and concluded that the doctors were operating as officers of a corporation in making staffing decisions. *Id.* at 817. While the Third Circuit found that the medical staff itself was a combination of individual doctors that would satisfy the Section 1 "contract, combination or conspiracy" requirement, its holding that the hospital could not conspire prevented Section 1 remedies against it. *Id.* at 814-815.

In *Okansen*, the Fourth Circuit affirmed the district court's summary judgment order that the medical staff which made privilege recommendations to the hospital lacked the ability to conspire with the hospital in the peer review process. 945 F.2d at 711. The Fourth Circuit held that the medical staff was "indistinct" from the hospital for purposes of peer review decisions because they had a "unity of interest" in improving the quality of care at the hospital. *Id.* at 703. The *Oksanen* court also cited the policy rationale that coordinated conduct in the health care context should not be penalized as it would discourage hospitals from investing authority in their medical staff and

discourage staff members from accepting and exercising delegated authority. *Id.* at 703-04.

In *Hibbett*, two nurse midwives and the obstetrician with whom they associated alleged that the hospital and some of its staff conspired to deny them hospital privileges. 918 F.2d at 607. Agreeing with the reasoning in *Weiss*, the Sixth Circuit Court held that the staff was acting as the agent of the hospital, and the intracorporate conspiracy doctrine prevented a finding of conspiracy. *Id*. at 614.

Circuits Holding a Hospital and Its Staff Are Separate Entities

The Ninth and Eleventh Circuit Courts of Appeal have held that a hospital and members of its medical staff are legally *capable* of conspiring with one another. *See, e.g.*, *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988). In *Bolt*, the Eleventh Circuit held that a hospital can conspire with its medical staff for purposes of Section 1 liability. 891 F.2d at 819. The plaintiff doctor in *Bolt* was denied staff privileges at several Florida hospitals. *Id*. at 814. Dr. Bolt filed suit, alleging that the defendant hospitals conspired with their medical staffs to restrain competition by revoking Dr. Bolt's staff privileges in violation of Section 1. *Id*. at 816. At the close of evidence, the trial court granted defendants' motion for directed verdicts finding that there was insufficient evidence of concerted action. *Id*. at 817. The Eleventh Circuit reversed this ruling, holding that a hospital and the members of its medical staff are legally capable of conspiring. *Id*. at 819. The court held that the relationship between the hospital and its doctors differed from the relationship between a corporation and its officers or employees, whose acts more frequently fall within the scope of their agency:

> Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent erosion of the principle that section 1 does not reach unilateral acts. A hospital and the members of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy."

Id.

Although not a peer review case, the Ninth Circuit in *Oltz* held that a group of anesthesiologists could conspire with a hospital under Section 1. 861 F.2d at 1450. This case involved a claim by a nurse anesthetist that a local hospital and a group of anesthesiologists entered an exclusive contract for services in order to eliminate competition. *Id*. at 1442-43. That jury found the defendant hospital liable, and the Ninth Circuit held that the interests of the anesthesiologists "were sufficiently independent so that the collaborated conduct between the anesthesiologists and [the hospital] coalesced economic power previously directed at disparate goals." *Id.* at 1450. The *Oltz* court stated that the interests of the anesthesiologists staff "were not as wed as the ties between a corporation and its officers or employees." *Id.*

The Circuit Split in Light of *American Needle*

Although not a peer review case, in 2010, the United States Supreme Court in *American Needle, Inc. v. National Football League* held that the alleged conduct of the National Football League ("NFL") teams in forming and granting an exclusive license to National Football League Properties ("NFLP") to market their individually owned intellectual property was concerted action not categorically beyond the coverage of Section 1. 130 S. Ct. 2201, 2206-07 (2010). The Court held that "[t]he key is whether

the alleged 'contract, combination . . . or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers." *Id.* at 2212. "The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision making, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* (internal citations and quotations omitted). The Court stated that "[t]he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." *Id.* at 2216. Yet, those interests did not justify treating the NFL teams as a single entity for purposes of Section 1 when it came to the marketing of their separately owned intellectual property. *Id.* at 2217.

The circuit cases addressing whether a hospital and its reviewing doctors are capable of conspiring to deny a doctor hospital privileges were decided prior to the Supreme Court's decision in *American Needle*. While not ignoring the economic interests of the actors, the Third, Fourth and Sixth Circuits placed considerable emphasis on the need for hospitals to rely on their medical staff for privilege recommendations to ensure medical quality and cooperation among staff and employees. The Ninth and Eleventh Circuits emphasized the separate economic interests of the actors and drew a distinction between these decisions and normal corporate decision making. Given *American Needle*, one might expect a substantial

record and focused inquiry on the separate economic interests of the hospital and staff doctors in future cases.

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