Feminist Women's Health Center v. Mohammad:
A limitation on medical review committees?

In recent years, governmental agencies and the public have increasingly focused attention on the application of federal antitrust laws to the health care industry. A major impetus for such increased attention resulted from a number of U.S. Supreme Court decisions in the 1970's which exposed all professions to greater antitrust scrutiny than ever before. These decisions have not only broadened the scope of the application of federal antitrust laws to include health care providers, but have also limited the availability of traditional defenses against alleged violations.

The impact of these decisions may ultimately reshape the nation's health care providers because of the constraints on activities imposed by the antitrust laws. The method of operation for hospitals and medical staffs in dealing with questions of medical staff membership and hospital privileges, insofar as the standards of eligibility for an appointment or a grant, may undergo substantial modification if the full force of the antitrust laws is brought to bear on the health care industry.

One recent case which is evidence of the trend is the decision of the U.S. Court of Appeals for the Fifth Circuit in Feminist Women's Health Center v. Mohammad, 586 F. 2d 530 (December 20, 1978) which makes several important points. First, a defense to the Sherman Antitrust Act on the basis that interstate commerce is not affected now becomes very difficult to sustain. Second, two of the strongest defenses traditionally available to health care providers to refute antitrust violations, namely the state action immunity and the Noerr-Pennington doctrine, have been substantially eroded by this decision. But, because the court's reasoning on these issues is confused, clear guidelines as to when these defenses would be successful cannot be drawn from the decision.

Case background

The Feminist Women's Health Center case involved allegations by a Tallahassee outpatient abortion clinic that certain physicians who specialized in obstetrics and gynecology and served on the staff of a neighboring hospital, conspired to fix prices of abortions, boycott the clinic, and monopolize the market for providing abortion services in the Tallahassee area. The clinic alleged that the physicians had, in con-
cert with each other and with the State Board of Medical Examiners, deprived the center of physicians and back-up services.

Several defenses were advanced by the physicians to refute these allegations including the contention that since the abortion clinic did not substantially affect interstate commerce, it could not maintain an action under the federal antitrust laws. The Court disagreed, however, noting that the clinic served out-of-state patients, purchased supplies from out-of-state, and obtained revenues from out-of-state insurers. Looking to an aggregate of factors, then, the Court found a substantial adverse effect on interstate commerce. (This decision is in keeping with the U.S. Supreme Court's most recent case affirming the principle that a restraint of hospital business can affect interstate commerce.)

First defense

In Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976), a small investor-owned hospital charged that a voluntary hospital and the local health planning agency conspired to block a proposed expansion of the plaintiff's facilities for anti-competitive reasons. In finding the federal laws applicable, the U.S. Supreme Court stated that the hospital's business was not "strictly a local, intrastate business" since the hospital purchased out-of-state medicine and supplies, obtained revenues from out-of-state insurance companies, paid management fees to its out-of-state parent corporation and obtained financing for the proposed expansion from out-of-state financiers. This combination of factors, said the Court, was "sufficient to establish a substantial effect on interstate commerce under the Act."

While any one of the effects cited in Hospital Building Co. would be sufficient to support a finding of Sherman Act jurisdiction for other industries, after that decision, some antitrust experts agreed that cumulative effects on interstate commerce were necessary before health care institutions would be subject to the Act. This more stringent test for applying antitrust laws to health care apparently recognized the public interest in the delivery of health care services and the non-commercial nature of the health delivery system. However, in recent decisions, including Feminist Women's Health Center, the courts have been extremely reluctant to dismiss cases on the basis that challenged activities do not affect interstate commerce.

Second defense

A second antitrust defense advanced by the defendants in Feminist Women's Health Center was the Noerr-Pennington doctrine which is grounded in the First Amendment's guarantee of the right to petition governmental bodies. First noted in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and articulated in a number of Supreme Court decisions thereafter, the doctrine protects concerted efforts which are otherwise subject to antitrust attack, so long as they are undertaken to influence government. Noerr itself concerned efforts to achieve anti-competitive action by securing legislation.

One important limitation on the Noerr-Pennington doctrine relates to whether the petitioning activity undertaken is genuine. Thus, protection will not be afforded purported petitioning activity which is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

A third defense advanced by at least one defendant was the state action exemption from antitrust liability. That judicially recognized exemption would bar antitrust liability for anti-competitive actions taken by the state acting as sovereign. The doctrine is generally said to have originated in Parker v. Brown, 317 U.S. 341 (1943) in which the Supreme Court held that an anti-competitive agricultural program estab-
lished by California law was immune from antitrust attack. (More recent decisions of the Supreme Court have expressly limited the state action defense to immunize only those activities which are mandated by the state acting as sovereign.)

Third defense

In Feminist Women’s Health Center, the defendant physicians, at their regular monthly meetings of the hospital’s obstetrics-gynecology staff, discussed, among other things, the practice of members who also worked for the abortion clinic. These discussions resulted in staff physicians’ refusal to work for the clinic. In addition, the discussions resulted in communications to a private organization of Tallahassee physicians urging non-association with the clinic. The discussions also led to a communication to the head of the residency department at a nearby hospital, urging that residents not affiliate with the clinic since it had inadequate provision for post-abortion care.

Finally, the staff physicians wrote the State Board of Medical Examiners, stating that possible violations of the Florida Medical Practice Act were occurring because the clinic lacked adequate provision for continuous after-care. As a result of this letter, the head of the State Board made an informal call to the resident physician performing abortions at the clinic, advising him that it was unwise to affiliate with the clinic since it had inadequate provision for post-abortion care.

In considering whether the Noerr-Pennington doctrine protected any of these activities, the Court found a distinction between the letter written to the Board of Medical Examiners and the other actions taken by the physicians. The Court reasoned that the letter of complaint could have genuinely been intended to influence the Board to take action against physicians found violating Florida statutes. Thus, the Court left to the jury the question of whether this petitioning activity was genuine. If genuine, it would be protected by Noerr-Pennington.

Although the Court found that the other activities undertaken by the medical staff were not protected by Noerr-Pennington, it noted, nevertheless, several state statutes which immunized medical review committees from liability as the result of actions taken in the course of evaluating the performance of health care providers. The Florida statute confers limited immunity on the actions of these committees, but, said the Court, this is not sufficient to convert medical review organizations into public regulatory bodies.

Despite the fact that hospital medical staffs play an important role in Florida’s regulatory scheme, their role is not a governmental one. Indeed, the State Board is not statutorily required to take action based on the physicians’ recommendations. Rather, the Board is granted discretionary power to act on the medical organization’s recommendations by disciplining physicians as it sees fit. Accordingly, although the Court granted Noerr-Pennington protection to the actions of such groups in reporting disciplinary findings and suspected violations to the Board, it noted that Noerr-Pennington would not protect the other communications since they did not constitute governmental or quasi-governmental action.

The Court, however, still appears confused in relying on state action principles to assess Noerr-Pennington protection. Whether the medical review committee was quasi-governmental is irrelevant for Noerr-Pennington purposes. Such status is not necessary for Noerr-Pennington protection since the doctrine should serve to protect any legitimate petitioning activity, whether conducted by a quasi-governmental group or private citizens.

Indeed, had the Court simply said that the physicians’ communications, other than those made to the State Board, were merely not made for the
purpose of petitioning government, the decision would have been much more understandable. In the alternative, the Court could have said that these communications of the medical review committee did not constitute state action since the committee is not quasi-governmental in nature. But, in overlapping principles as it did, the Court leaves unclear which defense is applicable in cases involving medical staffs.

The Court more squarely addressed the state action exemption in considering the actions of the head of the State Board which led to the resident physician's resignation at the clinic. The Court found nothing in the State Medical Practice Act justifying a summary judgment motion for the director on the state action issue. The essence of the complaint against the director was that he used the prestige of his office to coerce the resident physician's resignation, and that no order of reprimand or formal finding of guilt as contemplated by the Florida statute was entered by the Board.

While the Court reasoned that the director was entitled to a full hearing on the matter, it also stated that the state action immunity would be available only to the extent that the director's conduct was within the scope of authority granted him by the Florida legislature as head of the State Board of Medical Examiners. Thus, it comes as no surprise that unofficial actions, not sanctioned by statute, are not protected from antitrust exposure.

**Conclusion**

In summary, the Feminist Women's Health Center decision has not provided clear guidance as to what activities of medical review committees are permissible under the federal antitrust laws. But, the decision will not be the last to address the issue, and indeed, as it was only an appeal from a summary judgment motion, the trial court must still resolve many of the factual allegations. These allegations would include whether the physicians' letter to the State Board was sent in good faith, and whether, in acting upon that letter, the head of the State Board acted within the scope of statutory authority. Several principles, however, do remain clear from the decision.

First, the interstate commerce defense is becoming less and less available to protect concerted activities in the health care sector. It seems clear that the cumulation of effects on interstate commerce approach will serve to bring almost any health care facility under the scope of the antitrust laws. Indeed, it is conceivable that, in the future, courts will pay less attention to the cumulation approach and resort to traditional interstate commerce analysis, finding only one substantial effect sufficient to confer antitrust jurisdiction.

Second, the actions and communications of medical staff committees are not all under blanket protection from antitrust scrutiny, since these organizations are not governmental or quasi-governmental. The permissible limits of protected activities will have to be enunciated in decisions still to come.

It is always possible that the courts will reverse the trend to increase the application of antitrust laws in the area of health care, but the probability is that the trend will continue. The ultimate effect of this development is difficult to determine; however, it is clear that profound changes to the method of operation of health care providers will be wrought.