Recent Court Opinion Affects Antitrust Aspects of Peer Review

The May 8, 1989 issue of LACMA Physician featured an address by antitrust attorney Jack Bierig. He characterized the Patrick v. Burgett decision as a very unusual case because of a rare convergence of circumstances, one which the medical community would not likely see again. He pointed out that the denial of staff privileges occurred at the only hospital in a small Oregon town, and that Dr. Patrick's exclusion from competition would obviously have an impact on competition in his specialty of general surgery in that town. Further, the conduct of the peer review physicians in the Patrick case had been characterized by the Supreme Court as "shabby, unprincipled and unprofessional."

Although Bierig was certainly correct that the peculiar facts of the Patrick case are unusual, a recent decision of the Ninth Circuit Court of Appeals, the case of Pinhas v. Summit Health Limited, decided in July 1989, suggests that Patrick may have a greater impact upon California medical staff disciplinary disputes than was previously anticipated.

In the Pinhas case, Dr. Pinhas challenged removal of his staff privileges at Midway Hospital Medical Center in Los Angeles under Section 1 of the Sherman Antitrust Act, alleging that the defendants, including various members of the medical staff, had engaged in a conspiracy in restraint of trade after Dr. Pinhas' medical staff privileges were suspended and then terminated.

Dr. Pinhas also claimed that in addition to excluding him from healthcare facilities obtain reports of any previous denial of staff privileges before granting or reviewing staff privileges. Under Section 805 of the California Business and Professions Code, Midway would be required to report the disciplinary action to BMQA, which would then transmit the information to any other hospital where the plaintiff might apply for new or renewed staff privileges.

Similar reporting requirements are contained in the federal Health Care Quality Improvement Act. (In an unusual twist, the lawyers who represent the medical staff, and the hearing officer who presided over the disciplinary hearing, were also sued as co-conspirators.)

The first important issue decided in the case was whether the peer review activity involved would be exempt from the antitrust laws as part of a state regulatory scheme and thus, exempt under the state action doctrine. Despite the Supreme Court's decision affirming the antitrust judgment in the Patrick case, many commentators remained skeptical about whether the same analysis would apply to the California system of medical staff peer review. In the Patrick
case, the Ninth Circuit Court of Appeals had concluded that the defendants were protected from antitrust liability under the state action doctrine.

The United States Supreme Court reversed the decision of the Court of Appeals and concluded that the exemption to the antitrust laws for state action was inapplicable, since the system of peer review in Oregon was not actively supervised by the State.

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Therefore, there was not a sufficient degree of state action to exempt the peer review activity in question from the antitrust laws.

Prior to the Pinhas case, much doubt remained about whether the same analysis with respect to the state action doctrine would apply to peer review activities in California. It was hoped by many that the courts would conclude that there was “active supervision” of peer review in California by the State and that, therefore, medical staff peer review proceedings in California would fall within the state action exemption to the antitrust laws.

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supervises peer review decisions, nor does any State agency have any power to review peer review decisions or overturn such decision, even if they are anticompetitive and are violative of State policy.

Further, the court stated that even the system of court review in California, with respect to peer review actions, provides such a limited rule for the courts — permitting them only to determine whether the action taken was irrational, unlawful or contrary to established public policy or procedurally unfair — that “such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine.”

This Court's analysis of the issue of state action exemption from the antitrust laws is interesting from another viewpoint. Several years ago, the California Supreme Court had ruled that medical staff privileges held by a physician constituted a property right. Therefore, decisions to terminate those privileges were subject to independent review by the courts.

Subsequently, the California Legislature passed a law which provided that peer review decisions to terminate medical staff privileges could only be overturned by the courts if there was not substantial evidence to support the decisions and that the courts were no longer to exercise their independent judgment in reviewing such peer review decisions.

Although this accorded a greater degree of protection from judicial review to hospitals and those persons taking part in peer review disciplinary decisions, it supervision by the courts and by all other California governmental agencies. Ironically, what was intended to provide greater security from litigation in some instances may have served to create greater exposure to potential antitrust liability.

Several other aspects of the case are also of great interest. First, the Ninth Circuit Court of Appeals rejected the argument that it was necessary to exhaust remedies under the medical staff bylaws before filing the antitrust suit. Even though the lawsuit in federal court for damages was

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filed before any hearing had been held under the medical staff bylaws, the court held that exhaustion was not necessary. The opposite is true as a matter of California law with respect to actions for damages filed in connection with peer review disciplinary proceedings.

As a matter of California law, peer review proceedings must be exhausted and no damage suit may be filed unless and until a California court sets aside the disciplinary action taken by the medical staff. This ability to imme-
federal courts under the federal antitrust laws.

Another interesting aspect of this case involved the court’s analysis of whether there was injury to competition. The courts have often stated that it is not sufficient for a competitor to show that he has been injured by anticompetitive activity. It was also necessary to show an injury to competition. In his address, Bierig emphasized the fact that in the Patrick case, the market in which Dr. Patrick practiced was limited — there was only one hospital and one physician group in that market.

It was thus apparent that the exclusion of Dr. Patrick would have an impact upon competition in that town. Interestingly, the Ninth Circuit Court of Appeals had very little trouble finding injury to competition in the Pinhas case, even though Dr. Pinhas was an ophthalmologist and eye surgeon practicing in a huge metropolitan area and in a market with a large number of competitors.

The court held that it was sufficient for Pinhas to establish that his services were provided at a rate lower than that of his competitors or that precluding him from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. This analysis by the court seems to suggest that it will not be extremely difficult for plaintiffs in such antitrust actions arising out of medical disciplinary proceedings to establish injury to competition.

Although the Pinhas case is an important judicial interpretation of the antitrust laws as they affect medical staff peer review proceedings and disciplinary actions, the case arose as a result of the dismissal of Dr. Pinhas’ claim immediately after it was filed. In other words, there has not been a trial and the facts of the case remain to be litigated. The appel-
late opinion in Pinhas, however, will govern the course of the trial if the case is not settled.

More significantly, as a published opinion and legal precedent, it contains the standards that will be followed by all federal trial courts in similar cases throughout the Ninth Circuit, which includes California. The decision teaches us that resourceful litigations can still challenge medical staff disciplinary actions under the federal antitrust laws.

The Health Care Quality Improvement Act was a legislative reaction by the United States Congress to the jury verdict in the Patrick case, in which a jury in the Federal District court in Oregon awarded $2.2 million in favor of Dr. Patrick.

Although the passage of SB-1211 has opted California out of portions of the federal Health Care Quality Improvement Act, it will not directly affect and cannot opt California out of the provisions pertaining to immunity under the federal antitrust laws, provided that fair procedure is accorded and that the action taken is based on the competence of professional conduct of the individual physician who is the subject of peer review, rather than on the basis of a personal vendetta or anticompetitive action on the part of competitors seeking to put the plaintiff out of business.

Thus, HCQIA provides expressly that "an action is not considered to be based on the competence or professional conduct of a physician" if the action is based on any "matter that does not relate to the competence or professional conduct of a physician." In cases such as Pinhas, if the plaintiff can prove that the disciplinary action was taken...