

STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE

STATEMENT 3: ENFORCEMENT POLICY ON HOSPITAL JOINT VENTURES INVOLVING SPECIALIZED CLINICAL OR OTHER EXPENSIVE HEALTH CARE SERVICES

INTRODUCTION

Most hospital joint ventures to provide specialized clinical or other expensive health care services do not create antitrust problems. The Agencies have never challenged an integrated joint venture among hospitals to provide a specialized clinical or other expensive health care service.

Many hospitals wish to enter into joint ventures to offer these services because the development of these services involves investments -- such as the recruitment and training of specialized personnel -- that a single hospital may not be able to support. In many cases, these collaborative activities could create procompetitive efficiencies that benefit consumers, including the provision of services at a lower cost or the provision of a service that would not have been provided absent the joint venture. Sound antitrust enforcement policy distinguishes those joint ventures that on balance benefit the public from those that may increase prices without providing a countervailing benefit, and seeks to prevent only those that are harmful to consumers.

This statement of enforcement policy sets forth the Agencies' antitrust analysis of joint ventures between hospitals to provide specialized clinical or other expensive health care services and includes an example of its application to such ventures. It does not include a safety zone for such ventures since the Agencies believe that they must acquire more expertise in evaluating the cost of, demand for, and potential benefits from such joint ventures before they can articulate a meaningful safety zone. The absence of a safety zone for such collaborative activities does not imply that they create any greater antitrust risk than other types of collaborative activities.

A. THE AGENCIES' ANALYSIS OF HOSPITAL JOINT VENTURES INVOLVING SPECIALIZED CLINICAL OR OTHER EXPENSIVE HEALTH CARE SERVICES

The Agencies apply a rule of reason analysis in their antitrust review of hospital joint ventures involving specialized clinical or other expensive health care services.⁹ The objective of this analysis is to determine whether the joint venture may reduce competition substantially, and if it might, whether it is likely to produce procompetitive efficiencies that outweigh its anticompetitive potential. This analysis is flexible and takes into account the nature and effect of the joint venture, the characteristics of the services involved and of the hospital industry generally, and the reasons for, and purposes of, the venture. It also allows for consideration of efficiencies that will result from the venture. The steps involved in a rule of reason analysis are set forth below.¹⁰

Step one: Define the relevant market. The rule of reason analysis first identifies the service that is produced through the joint venture. The relevant product and geographic markets that include the service are then properly defined. This process seeks to identify any other provider that could offer a service that patients or physicians generally would consider a good substitute for that provided by the joint venture. Thus, if a joint venture were to produce intensive care neonatology services, the relevant market would include only other neonatal intensive care nurseries that patients or physicians would view as reasonable alternatives.

Step two: Evaluate the competitive effects of the venture. This step begins with an analysis of the structure of the relevant market. If many providers compete with the joint venture, competitive harm is unlikely and the analysis would continue with step four described below.

If the structural analysis of the relevant market showed that the joint venture would eliminate an existing or potentially viable competing provider of a service and that there were few competing providers of that service, or that cooperation in the joint venture market might spill over into a market in which the parties to the joint venture are competitors, it then would be necessary to assess the extent of the potential anticompetitive effects of the joint venture. In addition to the number and size of competing providers, factors that could restrain the ability of the joint venture to act anticompetitively either unilaterally or through collusive agreements with other providers would include: (1) characteristics of the market that make anticompetitive coordination unlikely; (2) the likelihood that others would enter the market; and (3) the effects of government regulation.

The extent to which the joint venture restricts competition among the hospitals participating in the venture is evaluated during this step. In some cases, a joint venture to provide a specialized clinical or other expensive health care service may not substantially limit competition. For example, if the only two hospitals providing primary and secondary acute care inpatient services in a relevant geographic market for such services were to form a joint venture to provide a tertiary service, they would continue to compete on primary and secondary services. Because the geographic market for a tertiary service may in certain cases be larger than the geographic market for primary or secondary services, the hospitals may also face substantial competition for the joint-ventured tertiary service.¹¹

Step three: Evaluate the impact of procompetitive efficiencies. This step requires an examination of the joint venture's potential to create procompetitive efficiencies, and the balancing of these efficiencies against any potential anticompetitive effects. The greater the venture's likely anticompetitive effects, the greater must be the venture's likely efficiencies. In certain circumstances, efficiencies can be substantial because of the need to spread the cost of the investment associated with the recruitment and training of personnel over a large number of patients and the potential for improvement in quality to occur as providers gain experience and skill from performing a larger number of procedures. In the case of certain specialized clinical services, such as open heart surgery, the joint venture may permit the program to generate sufficient patient volume to meet well-accepted minimum standards for assuring quality and patient safety.

Step four: Evaluate collateral agreements. This step examines whether the joint venture includes collateral agreements or conditions that unreasonably restrict competition and are unlikely to contribute significantly to the legitimate purposes of the joint venture. The Agencies will examine whether the collateral agreements are reasonably necessary to achieve the efficiencies sought by the venture. For example, if the participants in a joint venture to provide highly sophisticated oncology services were to agree on the prices to be charged for all radiology services regardless of whether the services are provided to patients undergoing oncology radiation therapy, this collateral agreement as to radiology services for non-oncology patients would be unnecessary to achieve the benefits of the sophisticated oncology joint venture. Although the joint venture itself would be legal, the collateral agreement would not be legal and would be subject to challenge.

B. EXAMPLE—HOSPITAL JOINT VENTURE FOR NEW SPECIALIZED CLINICAL SERVICE NOT INVOLVING PURCHASE OF HIGH-TECHNOLOGY OR OTHER EXPENSIVE HEALTH CARE EQUIPMENT

Midvale has a population of about 75,000, and is geographically isolated in a rural part of its state. Midvale has two general acute care hospitals, Community Hospital and Religious Hospital, each of which performs a mix of basic primary, secondary, and some tertiary care services. The two hospitals have largely non-overlapping medical staffs. Neither hospital currently offers open-heart surgery services, nor has plans to do so on its own. Local residents, physicians, employers, and hospital managers all believe that Midvale has sufficient demand to support one local open-heart surgery unit.

The two hospitals in Midvale propose a joint venture whereby they will share the costs of recruit-

ing a cardiac surgery team and establishing an open-heart surgery program, to be located at one of the hospitals. Patients will be referred to the program from both hospitals, who will share expenses and revenues of the program. The hospitals' agreement protects against exchanges of competitively sensitive information.

As stated above, the Agencies would analyze such a joint venture under a rule of reason. The first step of the rule of reason analysis is defining the relevant product and geographic markets. The relevant product market in this case is open-heart surgery services, because there are no reasonable alternatives for patients needing such surgery. The relevant geographic market may be limited to Midvale. Although patients now travel to distant hospitals for open-heart surgery, it is significantly more costly for patients to obtain surgery from them than from a provider located in Midvale. Physicians, patients, and purchasers believe that after the open heart surgery program is operational, most Midvale residents will choose to receive these services locally.

The second step is determining the competitive impact of the joint venture. Here, the joint venture does not eliminate any existing competition, because neither of the two hospitals previously was providing open-heart surgery. Nor does the joint venture eliminate any potential competition, because there is insufficient patient volume for more than one viable open-heart surgery program. Thus, only one such program could exist in Midvale, regardless of whether it was established unilaterally or through a joint venture.

Normally, the third step in the rule of reason analysis would be to assess the procompetitive effects of, and likely efficiencies associated with, the joint venture. In this instance, this step is unnecessary, since the analysis has concluded under step two that the joint venture will not result in any significant anticompetitive effects.

The final step of the analysis is to determine whether the joint venture has any collateral agreements or conditions that reduce competition and are not reasonably necessary to achieve the efficiencies sought by the venture. The joint venture does not appear to involve any such agreements or conditions; it does not eliminate or reduce competition between the two hospitals for any other services, or impose any conditions on use of the open-heart surgery program that would affect other competition.

Because the joint venture described above is unlikely significantly to reduce competition among hospitals for open-heart surgery services, and will in fact increase the services available to consumers, the Agencies would view this joint venture favorably under a rule of reason analysis.

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Hospitals that are considering specialized clinical or other expensive health care services joint ventures and are unsure of the legality of their conduct under the antitrust laws can take advantage of the Department of Justice's expedited business review procedure announced on December 1, 1992 (58 Fed. Reg. 6132 (1993)) or the Federal Trade Commission's advisory opinion procedure contained at 16 C.F.R. §§ 1.1-1.4 (1993). The Agencies will respond to a business review or advisory opinion request on behalf of hospitals that are considering jointly providing such services within 90 days after all necessary information is submitted. The Department's December 1, 1992 announcement contains specific guidance as to the information that should be submitted.

FOOTNOTES:

9. This statement assumes that the joint venture is not likely merely to restrict competition and decrease output. For example, if two hospitals that both profitably provide open heart surgery and a burn unit simply agree without entering into an integrated joint venture that in the future each of the services will be offered exclusively at only one of the hospitals, the agreement would be viewed as an illegal market allocation.
10. Many joint venturers that could provide substantial efficiencies also may present little likelihood of competitive harm. Where it is clear initially that any joint venture presents little likelihood of competitive harm, it will not be necessary to complete all steps in the analysis to conclude that the joint venture should not be challenged. See note 7, above.
11. If steps one and two reveal no competitive concerns with the joint venture, step three is unnecessary, and the analysis continues with step four described below.