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Editors Note: This E*Zine was adapted from an article by Mark A. Cunningham which originally appeared in the Information Exchange, a newsletter published by the Antitrust Section of the American Bar Association. Mr. Cunningham moderated a program on *In re Resident Physicians Antitrust Litigation* and other recent antitrust developments at the Annual Spring Meeting of the Antitrust Section of the American Bar Association in Washington, D.C. on March 31, 2004. Jones Walker partners, Mr. Cunningham and David G. Radlauer, regularly counsel clients in the areas of antitrust and trade regulation and have extensive experience representing business clients against class action lawsuits involving antitrust claims.

FIDDLING WITH THE RESIDENCY MATCH PROGRAM: PLAINTIFFS SURVIVE MOTION TO DISMISS SECTION ONE PRICE FIXING CLAIM

By

Mark A. Cunningham

A recent decision by the District Court for the District of Columbia reconfirmed that even long-standing policies of educational institutions and other nonprofits are not immune from antitrust scrutiny. *See In re Resident Physicians Antitrust Lit.*, 2004 WL 249422 (D.D.C. Feb. 11, 2004). The complaint, filed by three former medical residents in May 2002, alleges that 28 teaching hospitals, one medical school, and seven organizations and trade associations involved in graduate medical education conspired in violation of Section 1 of the Sherman Act to "displace competition in the recruitment, hiring, employment, and compensation for physician residents" with the purpose and effect of stabilizing physician resident compensation and other terms of employment. In a lengthy opinion, United States District Judge Friedman refused to dismiss most of the named defendants, possibly setting the stage for a lengthy class action battle.

Plaintiffs describe the alleged conspiracy as having three components. The first and most prominent component of the alleged conspiracy concerns the matching program utilized by most fourth-year United States medical students to secure residencies after graduation. Under the matching program, medical school students enter into contracts with the National Resident Matching Program ("NRMP") in which they agree to provide NRMP with a ranked list of resident programs for which they are willing to work. Plaintiffs allege that NRMP is managed and operated by

the American Association of Medical Colleges ("AAMC") whose members include all accredited medical schools and teaching hospitals in the United States.

The defendant institutions and organizations are hotly contesting the allegations inside and outside the courtroom. NRMP is maintaining a Web site called "Save the Match" at www.savethematch.org to provide its perspective on the allegations and to generate public support for the match system. Among other things, NRMP stresses the significant financial stakes at play in the litigation for the defendants and the 15 law firms representing plaintiffs and points to the cost of the litigation as the reason why NRMP has increased its fees for the matching program this year. According to NRMP, even a relatively nominal award of $1,000 per plaintiff would lead to a judgment of $600,000,000 when trebled if plaintiffs are correct in estimating that the plaintiff class would consist of 200,000 members. However, Plaintiffs are likewise bringing their fight to the public. The lead named plaintiff, Dr. Jung, is quoted in the national media as accusing the defendant institutions of using residents as "cheap labor" (current first-year residents average salaries in the mid to high thirties depending on the program and their geographic location) and saying that residents spend much of their time performing menial and administrative tasks rather than treating patients.

Although the defendants are seeking permission to appeal the order denying the motion to dismiss, the next stage of the litigation at the trial court level will be class certification. On January 16, 2004, the plaintiffs filed an amended motion to certify a plaintiff class and a defendant class. The definition for the defendant class proposed by the plaintiffs is: "(a) All NRMP Institutional Participants as of the date of certification of the Defendant Class, and entities that were NRMP participants Institutional Participants at any date since May 7, 1998; (b) all AAMC/COTH Member Hospitals as of the date of certification of the Defendant Class, and entities that were AAMC/COTH Member Hospitals at any time since May 7, 1998; (c) all ACGMR-accredited Sponsoring Institutions as of the date of certification of the Defendant Class, and entities that were ACGME-accredited Sponsoring Institutions at any time since May 7, 1998 ("Defendant Class"). The Defendant Class excludes all entities that are instrumentalities of federal, state or local government, including hospital districts and counties."

If the defendant class is certified, private teaching hospitals and medical schools across the country will be forced to decide whether to opt

out of the class or remain exposed to liability as part of the defendant class. The decision to opt out may seem obvious, but it may not be the right decision for everyone. Each potential class member will have to consider its unique circumstances and defenses to determine whether opting out presents the correct strategy, an analysis that each institution should be undertaking now instead of later. As part of that analysis, each potential class member should be considering the steps available to them to mitigate their exposure in this lawsuit and in any copycat lawsuits. For example, one component of the alleged conspiracy involves the exchange of salary information through an annual survey conducted by the AAMC. Should potential defendant class members continue to submit information for inclusion in the annual survey? Should potential defendant class members demand that the AAMC modify the scope and types of information disclosed in the survey? Failing to answer these questions can significantly increase an entity's exposure later.

If you believe your company may be a potential class member in *In re Resident Physicians Antitrust Lit* or may be confronting other antitrust issues, we strongly recommend that you engage experienced antitrust counsel to assist your company in avoiding potentially devastating pitfalls.

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CMS PROPOSES RULE TO IMPLEMENT MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT AND TO REVISE PAYMENT POLICIES AND FEE SCHEDULES

By

Allison C. Bell and Carl C. Hanemann

On July 26, 2004, the Centers for Medicare & Medicaid Services issued the text of a proposed rule that would implement the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the "MMA") and revise payment policies and relative value units ("RVUs") under the physician fee schedule for calendar year 2005. The proposed rule is over 500 pages long and is extremely wide ranging.

Proposed provisions implementing the MMA include: coverage of initial preventive physical examination; coverage of cardiovascular screen and blood tests; coverage of diabetes screening tests; incentive payment improvements for physicians in shortage areas; payment for covered outpatient drugs and biologicals; payment for dialysis services; hospice consultation service; indexing the Part B deductible to inflation; extension of coverage for treatment in the home of primary immune deficiency diseases; clinical conditions for payment of covered items of durable medical equipment; and payment for diagnostic mammograms.

The proposed rule will also include the following changes, among others, to payment policies and RVUs for calendar 2005: updated geographic practice cost indices for physician work and practice expense; updated malpractice RVUs; revised requirements for supervision therapy assistance; changes to payment policies where physicians and practitioners manage dialysis patients; revised requirements for supervision of diagnostic psychological testing services; revised requirements for assignment of Medicare claims; and additions to the list of telehealth services.

One item in the proposed rule that has received extensive attention in the press is the proposed cut to Medicare reimbursement for certain cancer drugs that are dispensed in doctor's offices, including an 81% reduction (from $138.28 to $25.84 per dose) of Taxol, a drug used to treat ovarian,

breast, and non-small-cell lung cancer, and a 53% reduction (from $500.58 to $234.28 per dose) for Lupron, a hormone therapy drug used to treat prostate cancer. The MMA mandated not only the drug reductions but also increases in payments to physicians for related cancer treatment reimbursement expenses, such as nurses and equipment. Although the proposed rule is expected to significantly reduce reimbursements to oncologists for drugs dispensed in their offices, no action has yet been taken to increase physician reimbursement for the related expenses.

The proposed revisions were published in the Federal Register on August 3 and 5, 2004 and but were previously published in full on the CMS website. *(Click here to link to the full text of CMS' proposed revisions.)* CMS will accept comments on the proposed revisions until October 4, 2004. Comments can be submitted by e-mail to *http://www.cms.hhs.gov/regulations/ecomments/*. For further information, please contact:

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Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact: the Health Care practice chairs:

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