Health Staffing Shortages May Draw More Antitrust Scrutiny

By **Dylan Newton and Michael Horn** (June 7, 2023)

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Widespread staffing shortages in the health care industry may cause courts to begin cracking down on hospitals and hospital systems that have engaged in allegedly anti-competitive behavior.

Hospitals may be subject to state and federal antitrust laws that prohibit them from engaging in unlawful anti-competitive behavior. The Sherman Antitrust Act[1] may prohibit a hospital from entering into an agreement to restrain trade, or from entering into an unlawful monopoly.

Similarly, states across the country have adopted nearly identical laws, such as the New Jersey Antitrust Act,[2] New York's Donnelly Act[3] and the Connecticut Antitrust Act.[4]

Antitrust claims against a hospital have arisen under a variety of different situations. For example, doctors have asserted these types of claims after having their clinical privileges denied or terminated by a hospital for anti-competitive reasons.[5] These types of claims have also been asserted against hospitals that have unfairly acquired other medical practices or professionals in an attempt to monopolize the market.

For example, in Martin v. Memorial Hospital at Gulfport in the U.S. Court of Appeals for the Fifth Circuit in 1996, a doctor brought antitrust claims against a hospital based on the hospital's proposed exclusive agreement to allow another physician to operate its facility for end-stage renal disease.[6] The doctor argued that the exclusive agreement was an unlawful attempt by the hospital to monopolize the market.

Historically, courts were hesitant to police a hospital's staffing or business decisions under antitrust laws.

For instance, in the Superior Court of New Jersey, Appellate Division's 2004 decision in Patel v. Soriano,[7] a doctor asserted a claim against the hospital and members of the medical staff arguing that they engaged in an unlawful conspiracy to deny his application for staff membership, in violation of New Jersey Revised Statutes, Section 56:9-3.

The New Jersey Appellate Division dismissed the doctor's claims, finding that the defendants' actions were not anti-competitive, and that the hospital had absolutely no economic interest in denying plaintiff's application for privileges.

Likewise, in Jaffee v. Horton Memorial Hospital in 1988,[8] the U.S. District Court for the Southern District of New York held that a hospital was exempt from New York's antitrust statute and dismissed a doctor's claims based off his denial of membership to the medical staff.[9]

However, the tides are changing.

Recently, there have been unprecedented staffing shortages in the medical field in the wake

of the COVID-19 pandemic. It is estimated that nearly 22% of hospitals throughout the country are suffering personnel shortages.

Experts predict that these severe staffing problems will continue. For instance, the American Hospital Association predicts that there will be a shortage of up to 124,000 physicians nationwide by 2033.

The extreme shortage of medical professionals has reduced the amount of choice that patients have when choosing their doctors. Staffing shortages at hospitals have created a stronger need to preserve competition in the health care market. It will likely result in courts cracking down on hospitals that have engaged in anti-competitive behavior through the use of antitrust laws.

Recent case law from several jurisdictions supports this conclusion.

For example, in Doctors Hospital of Laredo v. Cigarroa in the U.S. District Court for the Western District of Texas in 2022,[10] the hospital brought antitrust claims against a revival hospital specializing in interventional cardiological services.

The plaintiff alleged that the defendant entered into an unlawful conspiracy to block their recruitment of potential interventional cardiologists.[11] The district court denied the revival hospital's motion to dismiss and held that the alleged

> anticompetitive conspiracy ha[d] lessened competition in [the relevant] market for interventional cardiology services. The anticompetitive conspiracy allegedly resulted in distinct injuries to Plaintiffs, including increased costs, lost revenues, and competitive disadvantages.

In reaching its conclusion, the court noted that the relevant market had nearly 260,000 residents, but only two institutions in the entire market provided interventional cardiological services.[12]

The court gave extra weight to the fact that the plaintiff's complaint explicitly alleged that the relevant market only had seven interventional cardiologists, even though a town that size should have at least 20 cardiologists, and the defendant's alleged conduct had a severe impact on competition and the public's right to choose its own physician.[13]

Thus, due to the shortage of interventional cardiologists in the surrounding area, the defendant's alleged conduct had a greater impact on the alleged market and therefore the court allowed plaintiff's antitrust claims to proceed.

The U.S. Court of Appeals for the Seventh Circuit reached a similar conclusion in Vasquez v. Indiana University Health Inc., also in 2022.[14]

In Vasquez, a surgeon brought an action against a hospital system alleging antitrust violations under Sherman Act and Clayton Act, arguing that the hospital system participated in an unlawful restraint on trade after it revoked the surgeon's admitting privileges at its hospitals and engaged in a targeted attempt to ruin his reputation and monopolize the local market.[15]

The Seventh Circuit reversed the district court's dismissal of the surgeon's complaint. In so doing, the Seventh Circuit gave weight to the surgeon's allegations that the hospital system reduced competition in the relevant marketplace, given the hospital system allegedly

employed nearly 97% of primary care physicians in the surgeon's town, and 80% of primary care physicians in the wider region.[16]

Due to the lack of doctors in the relevant market area, the hospital system's alleged actions had a greater impact on competition and the surgeon's complaint survived the motion to dismiss.

As severe staffing shortages in the health care industry continue over the next several years, both hospitals and medical professionals alike should remain cognizant of how staffing decisions will affect competition in the local market and whether staffing decisions will be perceived as anti-competitive.

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[1] 15 U.S.C. § 1, et. seq.

[2] N.J.S.A. 56:9-1, et. seq.".

[3] NY General Business Law § 340.

[4] C.G.S.A. § 35-24.

[5] See D'Arrigo v. S. Jersey Hosp. Sys. Inc., No. CUM-L-519-03, 2006 WL 2795337 (N.J. Super. Ct. Law Div. Aug. 25, 2006) (A doctor brought claims against a hospital and medical staff arguing that hospital and staff entered into an unlawful conspiracy to retrain trade after terminating his clinical privileges).

[6] Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391 (5th Cir. 1996).

[7] Patel v. Soriano, 369 N.J. Super. 192, 194 (App. Div. 2004).

[8] Jaffee v. Horton Memorial Hospital, 1988 WL 247973 (Orange Cty. 1988).

[9] See Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992) (dismissing the doctor's antitrust claims against the hospital because the hospital's alleged actions "[a]t the most, ... amounted to an informal and limited restraint on a single [doctor]"); but see Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995) (finding that a doctor adequately pleaded antitrust violations where he alleged that the defendant hospital unlawfully terminated his clinical privileges and tarnished his reputation thus preventing "other hospitals in the relevant market from employing or granting medical staff privileges" to him).

[10] Doctors Hospital of Laredo v. Cigarroa, No. SA-21-CV-01068-XR, 2022 WL 3567353 (W.D. Tex. Aug. 17, 2022).

[11] Id. at *4.

[12] Id. at *12.

[13] See id. at *12.

[14] Vasquez v. Indiana University Health Inc., 40 F.4th 582 (7th Cir. 2022).

[15] Id. at 584.

[16] Ibid.