

# What surgeons should know about...

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## Antitrust laws

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**W**ith the Federal Trade Commission (FTC) stepping up its enforcement actions in the health care arena, a basic understanding of antitrust laws has never been more important for surgeons. FTC Chairman Timothy J. Muris has laid out an extensive blueprint for action, which began to take effect in February with hearings on health care and competition law and policy. The Department of Justice (DOJ) cosponsored the meetings.

This article is intended to offer surgeons a cursory explanation of how the federal government examines health care cost, quality, and access through the lens of competition.

**Q. What are the origins of antitrust law?**

**A.** The basis of antitrust law is statutory. In 1890, Congress passed the Sherman Antitrust Act. Then, to clarify and supplement that law, Congress passed the Clayton Act in 1914, which created the FTC and authorized private parties to sue for violations of antitrust laws. Today, the FTC's Bureau of Competition and the DOJ's Antitrust Division share responsibility for enforcing these laws.

**Q. How is antitrust applied to physicians?**

**A.** As members of a "learned profession," physicians were immune for nearly a century from the normal rules of competition. In 1975, however, the U.S. Supreme Court declared that professional services are subject to antitrust laws. The Court held that anticompetitive activi-

ties by professionals could restrain commerce and that, while certain restraints imposed by professional associations might be judged to serve the public interest, all "commercial" restraints could be challenged as violations of antitrust laws.

**Q. What are the basic antitrust principles?**

**A.** The law indicates that certain practices, such as price fixing, are so inherently harmful to consumers that a detailed examination isn't necessary to determine whether the practices are reasonable. The law presumes that these practices are per se violations and condemns them almost automatically.

Other practices demand closer scrutiny by the agencies. These cases are examined under a "rule of reason" analysis. Pursuant to the rule of reason, a practice is illegal if its procompetitive effects fail to outweigh the restrictions it places on competition. In theory, such anticompetitive practices are likely to harm consumers by driving up prices, reducing accessibility of services, decreasing the quality of service, or appreciably stifling innovation.

The rule of reason analysis is rarely clear-cut. Consider an agreement among physicians to adopt a practice standard for vaginal birth after cesarean delivery, limiting the procedure to institutions equipped to respond to emergencies with physicians immediately available. The agreement to adopt the standard is restrictive: the physicians have limited their own ability to perform the procedure. In practice, however, the agreement limits consumer choice, even though

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the agreement to adopt the practice standard may benefit consumers in that it provides assurances of safety.

**Q. How does an agency or private party prove illegal business practices?**

**A.** Violations of antitrust laws are typically described as either horizontal or vertical in nature. Agreement among competitors horizontally can trigger investigation if the competitors agree to restrict competition among them. Likewise, certain kinds of vertical agreements between buyers and sellers are also illegal.

Proving a violation in most cases depends largely on demonstrating that an agreement exists. In the absence of a smoking gun, however, the agency may rely on a combination of circumstantial evidence to prove an inferred agreement. Remember, it is the agreement itself that is illegal. Thus, the agreement need not even be implemented for a violation to result.

**Q. In what settings can antitrust issues arise?**

**A.** Antitrust issues in health care may arise in many settings, including, but not limited to, the following:

- physician practice mergers.
- price-fixing by provider networks.
- physician unionization.
- provider standard-setting programs.
- exclusive contracts between payors and single groups of physicians.
- exclusive contracts between hospitals and physicians as to particular services rendered at the hospital.

**Q. Can physician unionization exist within the antitrust laws?**

**A.** Employed physicians may unionize to negotiate with employers. The antitrust laws, however, have been interpreted to prohibit physicians from unionizing to negotiate with health plans. To combat the increasing control that health plans have over the practice of medicine, physicians have long argued in favor of an exemption to antitrust laws allowing them to jointly negotiate.

To combat the increasing control that health plans have over how surgeons practice medicine, the House of Representatives is entertaining two pieces of legislation, H.R. 1247 and H.R. 1120. Rep. Ron Paul, MD (R-TX), introduced the Quality Health Care Coalition Act of 2003, H.R. 1247. The legislation aims to ensure and foster continued patient safety and quality of care by exempting health care professionals from the federal antitrust laws in their negotiations with health plans and health insurance issuers. H.R. 1247 is similar to legislation championed by former Rep. Tom Campbell during the 106th Congress.

Rep. Spencer Bachus (R-AL) and Rep. John Conyers (D-MI) introduced the Health Care Antitrust Improvements Act of 2003 (H.R. 1120). This legislation would change the standard of review under the antitrust laws when two or more physicians or other health care professionals attempt to negotiate with a health plan over contractual terms or plan policies. Additionally, the bill would establish demonstration projects in six states, which would have allowed physicians and other health care professionals to negotiate with health plans without violating antitrust laws. H.R. 1120 is considered to be a more moderate outgrowth of H.R. 1247. A Senate companion does not exist.

During the 108th Congress, the College is tracking this legislation to ensure that physicians and health plans are competing on a level playing field.

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## Q. Is antitrust scrutiny increasing?


**A.** The agencies' focus on health care continues to sharpen. According to Chairman Muris, the FTC continues to see a wide variety of overtly anticompetitive practices in the health care marketplace. The FTC continues to bring cases against physicians for what it deems the most egregious violations, including "naked" price-fixing. During 2002, the FTC reached settlements with a number of groups of physicians in antitrust actions. Several of these new cases involve an unprecedented number of physicians and some consultants who allegedly coordinated the price-fixing under the guise of assisting in negotiations with payors.

Last September, the FTC and DOJ held a two-day workshop featuring presentations by academicians, providers, insurers, employers, and patient groups. The workshop focused on clinical integration, payor/provider issues, group purchasing organizations, generic and branded drugs, and direct-to-consumer advertising of pharmaceuticals.

## Q. What is the status of antitrust policy in Washington?

**A.** Throughout 2003, the FTC plans to hold extensive health care hearings. The hearings, again jointly hosted with the DOJ, will be only the second set ever held by the Antitrust Division. Broadly, the hearings will examine the state of the health care marketplace and the role of competition, antitrust, and consumer protection in satisfying consumer preferences for high-quality, cost-effective health care. At the conclusion of the hearings, the commission aims to submit an extensive report of findings to Congress. In February, on behalf of the College, Frank Opelka, MD, FACS, participated in the first round of hearings.

The FTC indicates that during the course of the year the topics for the hearings will include hospital mergers, the significance of not-for-profit status, vertical integration, quality and efficiencies, market power, and the adequacy of existing remedies for anticompetitive conduct. In addition, the hearings are expected to explore the implications of the FTC's consumer protection mandate with regard to the performance of the health care financing and delivery markets.

In addition to participating in the hearings, the College continues to meet with the FTC regarding the impact of competition on surgeons. Look for future updates from the College as the hearings continue throughout the year. For more information about this issue, contact Jennifer Razor at [jrazor@facs.org](mailto:jrazor@facs.org). 

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**Note:** This article is an educational tool only and should not be construed as legal advice. Should a legal question arise regarding antitrust, Fellows should consult an attorney.

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### Bibliography

- Federal Trade Commission. Web site: [www.ftc.gov](http://www.ftc.gov).  
*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).  
Muris TJ: "Everything Old Is New Again: Health Care and Competition in the 21st Century." Speech presented at Seventh Annual Competition in Health Care Forum, November 7, 2002, Chicago, IL.