

Pennsylvania Bar Institute Health Law Institute 2019

Rethinking Hospital-Physician Exclusive Agreements in an Evolving Health Care System

Henry Casale
Horty, Springer & Mattern, P.C.

Summary

- **Does precedent involving exclusive agreements in a single hospital apply to a health systemwide exclusive agreement?**
- **Process**
- **Terms**
- **Effect of Employment**

Exclusive Agreements - Historical Perspective

**Balance of procompetitive vs.
anticompetitive aspects**

*Jefferson Parish Hospital – District No. 2
v. Hyde (1984)*

Justice O'Connor concurring opinion states:

“From the viewpoint of hospital management, the tie-in ensures 24-hour anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively to monitor the quality of anesthesiological services.”

*Jefferson Parish Hospital - District No. 2
v. Hyde (1984)*

“Further, the tying arrangement is advantageous to patients because, as the District Court found, the closed anesthesiology department places upon the hospital, rather than the individual patient, responsibility to select a physician who is to provide anesthesiological services.”

*Jefferson Parish Hospital – District No. 2
v. Hyde (1984)*

“The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient.”

*Jefferson Parish Hospital – District No. 2
v. Hyde (1984)*

“In assuming these responsibilities – responsibilities that a seriously ill patient frequently may be unable to discharge – the hospital provides a valuable service to its patients.”

**In Re Burnham Hospital
101 FTC 991 (1983)**

The FTC concluded that a properly drafted exclusive contract is not likely to have an anti-competitive effect on the local market when the contract is of a reasonable duration or can be terminated upon reasonable notice.

The FTC also noted that exclusive contracts may have several pro-competitive effects by providing a number of benefits to hospitals and their patients. The FTC found that such contracts can:

- increase the hospital's control over the operation of a department;**
- ensure full-time availability of services;**
- lower costs through standardization of procedures;**
- permit better scheduling of the use of facilities;**
- facilitate maintenance of equipment;**
- improve supervision of support staff and working relationships between the staff and physicians; and**
- improve the quality of services by assuring that physicians perform enough procedures to maintain their proficiency.**

Factors Significant to FTC's Opinion

**Proposed exclusive contract did not violate the antitrust laws.
Those factors included:**

- **the contract facilitated the efficient operation of the department;**
- **the decision was made unilaterally by the hospital in the best interest of the hospital and was not taken in furtherance of any agreement or conspiracy between the hospital and the medical staff or any of its members;**
- **the contract was for an initial three-year term; and**
- **the contract could be terminated by either party without cause on 180 days' notice by either party, thus preserving the opportunity for competition among providers for the contract.**

**As the Seventh Circuit Court of Appeals stated in *BCB Anesthesia Care, Ltd. v. The Passavant Memorial Area Hospital Association*,
36 F.3d 664, 667 (7th Cir. 1994):**

This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason – there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions.

Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act. (Citations omitted.)

But how does this precedent affect the ability of a health system to have a systemwide exclusive agreement?

PA law and 3rd Circuit cases of note

PA Law

*Adler v. Montefiore Hospital
Association of Western Pennsylvania,
453 Pa. 60 (1973)
(cert. denied, 94 S.Ct. 870 (1974))*

- **Competence of physician was not an issue**
- **Physician not allowed access to hospital cath lab**
- **Involved an employment agreement in a single hospital**
- **Court analyzed hospital's policy of exclusivity, not discharge from employment**
- **Hospital produced "voluminous expert testimony" in support of its policy**
- **Policy upheld**
- **No right to a medical staff hearing**

Supreme Court recognized patients can choose a hospital or may choose a physician, but no right to have the physician of his/her choice provide services at the hospital of choice.

Justice Roberts' dissent focused on economic benefit to hospital of employment relationships.

What about a hospital system?

Early Cases of Note:

- *Castelli v. Meadville Medical Center*, 702 F.Supp. 1201 (WD Pa. 1988) *aff'd w/o opinion* 872 F.2d 411 (3rd Cir. 1989)
- *Bocobo v. Radiology Consultants of South Jersey PA*, 305 F.Supp.2d 422 (D. NJ 2004), *aff'd*, 477 F.App'x 890 (3rd Cir. 2012)

Hospital Legislative Process

- Internal hospital process followed noted in *Adler and Castelli*
- Legislative or semi-legislative process vs. adjunctory process best described in a series of California cases (e.g., *Mateo-Woodburn v. Fresno Community Hospital*; *Redding v. St. Francis Medical Center*)
- Shows importance of RFP process

What about in a System?

- Legal - ↑ geographic area covered by a systemwide agreement should not be a legal concern. Several cases have upheld exclusive agreements for a sole community provider
- *Dr. Steurs and Latham v. National Enterprises Inc.* (4th Cir. 1988)
- *Oltz v. St. Peter's Community Hospital* (9th Cir. 1988)
- *Castelli* court rejected “Essential Facility” claim

Issues to be addressed in a systemwide exclusive agreement

- 1. Current agreements**
- 2. Are exclusive services defined in the same manner in all hospitals?**
- 3. Not all hospitals are the same - address unique needs of each hospital**
- 4. Does one provider have the capacity to service the system?**
- 5. Will the provider be willing to organize group to provide the systemwide services?**

Board Resolution

- **Moratorium on new applications while RFP process is ongoing**

Significant Terms

- **Number of providers**
- **How much specificity to include in agreement?**
- **Need to guard against exclusive provider trying to do too much with too few providers**

Billing for Professional Services

1. Important procompetitive aspects of exclusivity
2. Consider from patient's perspective – patient has no choice as to an alternative provider
3. IRS Rev. Proc. 2017-13

IRS Rev. Proc. 2017-13 – the hospital must either approve the rates charged by the exclusive provider, or require that the exclusive provider “charge rates that are reasonable and customary as specifically determined by or negotiated with, an independent third party (such as a medical insurance company).”

All Payer Clauses

Also important pro-competitive aspect
of an exclusivity.

Important to both hospital and patients.

But, sometimes difficult to implement in ever
changing insurance market.

Term and Termination

~~Rev. Proc.
97-13~~

Replaced by Rev. Proc. 2017-13

- **Eliminates restrictions on term and termination**
- **But still have antitrust concerns if term is for an unreasonable period of time**

Also don't forget about...

*Community Hospital of Andalusia
v. Tomberlin*

- **Group should also consider its agreements with its providers (especially shareholder and employment agreements)**
- **Bocobo – \$300,000 jury verdict based on Group’s SH agreement and deferred compensation plan**
- ***Pinnacle Anesthesia Consultants v. Fisher* (Tex. App. 2009) – \$8,597,508.27 jury verdict against group based on termination of anesthesiologist**

Clinical Privileges and Due Process Rights

- Should be addressed in exclusive agreement
- Also important procompetitive aspect of exclusive agreements (recognized in *In Re Burnham Hospital*)
- Legislative decision – no hearing
- No right to a hearing – upheld in *Adler* (see also *McMorris v. Williamsport*, 597 F.Supp. 899 (MD Pa, 1984); *Lyons v. St. Vincent Health Center*, 731 A2d 206 (PA Cmwlt. 1999); *Bocobo v. Radiology Consultants*)
- But consider prior course of dealings – *Lewisburg Community Hospital v. Alfredson* (805 SW.2d 756 (Tenn. 1991))

Payment to Exclusive Provider

- Due to terms of an exclusive agreement, guarantee like payments common
- Payment for administrative services also common, but **NOT LEGALLY REQUIRED** in most exclusive agreements
- Consider OIG Supplemental Compliance Guidance for Hospitals (Jan. 31, 2005)

Use of Employed Physicians as Exclusive Provider

- In many hospitals, only option and not controversial
- Often, more practical than legal concerns with this approach
- But legal questions remain
- *Adler* case early use of exclusive employment in Pennsylvania
- *Adler* court rejected economic arguments often raised by use of employed physicians (see dissent)

Conclusions

1. Exclusive agreements in a single hospital are lawful and common.
2. Use of systemwide exclusive agreements, while not as common, are lawful.
3. Use RFP process to consider facts and circumstances of the systemwide agreement as well as to address the legal issues.
4. Institute Board moratorium on new applications while RFP process is ongoing.
5. Use of hospital-employed physicians as exclusive provider also becoming more common.
6. *Adler* helps with use of employees, but not as much legal precedent as with exclusive agreements.

