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One of the most significant of the many developments contributing to the revolution in the health care field in the past ten years is the federal government's decision to prosecute health care professionals criminally for alleged violations of the antitrust laws. Almost unthinkable ten years ago, hospitals and physicians now face the new—and very real—prospect of criminal investigation and prosecution for activities that are recognized as per se violations of the antitrust laws and for which other businesses and business people have long been convicted.[1]

Over the years the seemingly different treatment of health care professionals led to a perhaps understandable but now misplaced confidence that health care providers were somehow immune from criminal prosecution. That belief has now been convincingly shattered. Not only is it unmistakably clear that the antitrust laws apply to health care professionals, like any other professional or nonprofessional engaged in business,[2] but the government demon-

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1. Agreements among competitors to fix prices, allocate markets, and/or engage in group boycotts are per se violations of the antitrust laws. The government does not need to prove an anticompetitive intent or effect in such cases, as it must in other antitrust cases, because the anticompetitive effect of these practices has been so well established in case law. These activities have long been considered the most egregious type of antitrust violation and have been prosecuted criminally in most industries, although not in the health care field until recently.

2. In three major decisions, the Supreme Court held unequivocally that professional activities are not exempt from the antitrust laws or from per se scrutiny. *See* Federal Trade Comm'n v. Superior Court Trial Lawyers Assn., 493 U.S. 411 (1990); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (citing Associated Press v. United States, 326 U.S. 1, 7 (1945)) ("the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act").

strated that it will, at its discretion, enforce the antitrust laws criminally as well as civilly against health care and non-health care violators alike.

In hindsight, it is not surprising that the health care industry became a major focus of the antitrust enforcement agencies during the 1980s and early 1990s. By the 1980s, health care became the number one industry in the United States. Moreover, it was an industry undergoing profound change—a belated industrial revolution of its own. Lasers, MRIs, fiber-optic devices, and other expensive medical equipment revolutionized medical diagnosis and treatment but increased the cost of medical care enormously. At the same time, the introduction of new managed care concepts brought basic organizational change. In short, the health care industry was being transformed from a cottage industry of independent physicians and hospitals providing customized service into a more sophisticated industry of HMOs, PPOs, and national health care systems.

One could have predicted that with these revolutionary changes would come new antitrust concerns, because antitrust and big business go hand-in-hand. Yet, few in the medical community were prepared for the antitrust implications of the changes that were taking place. Typically inexperienced in business management and largely untutored in the antitrust laws, health care providers suddenly found themselves confronted with complex legal issues that they would hardly have contemplated a decade before. Faced with threatening new forms of competition in a managed care environment quite unlike the fee-for-service world they were accustomed to, they were naturally drawn toward new collaborative ventures that appeared to offer competitive advantages in pooling resources and in reducing unnecessary duplication of services. Most of these ventures were procompetitive, but some may have had anticompetitive effects that the providers did not recognize as potential problems under the antitrust laws.

BACKGROUND

The Sherman Antitrust Act is both a civil and criminal statute. However, the language of the Act provides no criteria for determining whether a particular violation should properly be addressed by a criminal indictment or by a civil complaint. The Antitrust Division of the Department of Justice ("Department") and private parties brought many civil actions under the Act in various industries, and the Federal Trade Commission ("FTC") brought numer-

ous civil actions under the Federal Trade Commission Act, which contains prohibitions similar to those enumerated in the Sherman Antitrust Act.

The Department, which alone has authority to bring a criminal antitrust case, prosecuted many cases criminally as well. It won criminal convictions for price-fixing, bid-rigging, and the unlawful division of markets and allocation of customers in a host of different industries, including the real estate, soft drink, milk, retail gasoline, steel drum, home-heating oil, and wholesale grocery industries. In the nine-month period from July of 1992 through March of 1993, the Department filed over one hundred criminal cases, including related obstruction of justice and perjury cases, against eighty-six corporations and eighty-four individuals.[3] Prior to 1990, the Department had brought only two criminal indictments, one against an association of medical professionals[4] and one against a pharmaceutical association.[5] Aside from these two cases, the Department relied solely on civil enforcement of the antitrust laws in the health care field.[6]

In deciding whether to prosecute a case criminally or civilly, the Department has had a long-standing policy of seeking criminal indictments "only where it believes it can prove a clear, purposeful violation of the law."[7] The vast majority of cases prosecuted crimi-

3. The Justice Department's major priorities have been the investigation and prosecution of bid-rigging and price-fixing on contracts let by the United States Department of Defense. The cases have involved a wide range of products and services, including power grid tubes, frozen seafood, milk and dairy products, and dam repair products. 35 individuals who have been sentenced to jail have received sentences averaging 288 days, and the Department has recovered $13.4 million in civil damages. At the present time, there are 19 grand juries in 12 states investigating antitrust matters involving defense procurement and another 32 grand juries in 21 states investigating bid rigging in the milk industry. Acting Assistant Attorney General John W. Clark, Antitrust Division, "60 Minutes with the Acting Assistant Attorney General," Remarks at the American Bar Association's 41st Annual Antitrust Spring Meeting (Apr. 2, 1993).

4. American Medical Ass'n v. United States, 317 U.S. 519 (1943) (criminal conviction of the AMA for conspiracy to obstruct the operation of Group Health Association, one of the first HMOs in the country).

5. Northern Calif. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.) *cert. denied*, 371 U.S. 862 (1962) (criminal conviction for price fixing).

6. Following the federal government's lead, the state of Arizona brought civil antitrust charges against two county medical societies in Arizona alleged to have conspired to fix the price of medical services in the late 1970s. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). Today, the federal government might well bring criminal antitrust charges against the medical societies in *Maricopa County*. However, in 1979, when the case was originally brought, the antitrust laws had only recently been held to apply to professionals. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

7. *See* Assistant Attorney General John H. Shenefield, Antitrust Division, Remarks at the Federal Bar Association, Cleveland Chapter (Apr. 18, 1979).

nally involved per se violations of the Sherman Antitrust Act: competitors are alleged to have entered into an agreement or conspiracy to fix prices, rig bids, divide the market, or allocate customers.

PENALTIES

The government's decision to proceed civilly or criminally obviously has profound consequences for an antitrust defendant. In a civil complaint, defendants typically face the prospect of being permanently enjoined from engaging in prohibited activities, although they also can be required to divest assets or dissolve associations. Defendants are potentially liable for civil penalties of up to $10,000 for each violation,[8] treble damages suffered by the United States as a purchaser of goods[9] and, in some cases, may be required to repay consumers injured by certain antitrust violations.[10]

A criminal violation of the Sherman Act, on the other hand, is a felony[11] for which a corporation may be fined up to $10 million; an individual may be fined up to $350,000, or imprisoned for up to three years, or both.[12] Under the Criminal Fines Improvement Act of 1984, the fine may be even higher under the "double loss/double gain" provision, which permits a fine of up to double the gross amount gained by a defendant or lost by the victim.[13] Under the United States Sentencing Commission's new Sentencing Guidelines, organizational offenses may be punished by fines ranging from fifteen to eighty percent of a firm's volume of affected commerce.[14] The new statutory maximum fine means that courts can impose the full range of monetary penalties recommended by the Commission.

The Sentencing Commission also raised the individual offense levels so that jail time will almost invariably result. Under the 1991 Guidelines, the minimum sentence for each violation is four

8. 15 U.S.C. § 45(l), 45(m) (1988).

9. *Id.* at § 15(a) (1988), as amended by the Antitrust Amendments Act of 1990, Pub. L. No. 101-588. Prior to the 1990 Act, the United States could recover only actual damages. *Id.* at § 15(b). Foreign governments in their capacity as purchasers may also recover damages, but only actual damages.

10. *Id.* at § 57b(b) (1988). The court is empowered to order a broad array of remedial measures, including rescission or reformation of contracts, restitution in the form of money refunds, the return of property, and contractual damages.

11. *Id.* at § 1, 2 (1988).

12. *Id.* at § 1.

13. 18 U.S.C. § 3571(d) (1988).

14. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2R1.1 (Nov. 1991).

to ten months.[15] In addition, those found guilty of a criminal violation may have their licenses revoked by the state and may be debarred from federal programs such as Medicare, Medicaid, and CHAMPUS (military coverage). In addition to the expense and turmoil of a grand jury investigation and criminal trial, a criminal conviction carries a stigma that is often far more devastating than the fine or term of imprisonment imposed. Since a criminal conviction is prima facie evidence of liability in a subsequent civil suit by injured parties seeking treble damages (plus attorney fees), there is also the prospect of civil damages on top of the devastating criminal penalties.

Recent Enforcement Action in the Health Care Field

The Justice Department, which views criminal antitrust violations as a serious form of white collar crime, will conduct prompt, aggressive investigations and seek to impose stiff fines and jail sentences under the federal sentencing guidelines. In the late 1980s, senior officials in the Antitrust Division ("Division") began to warn of possible criminal prosecution of health care providers who committed per se violations of the Sherman Antitrust Act by acting together to fix prices, boycott certain buyers or sellers, or divide the market by allocating patients or service area.[16] Officials in the Division gave more than forty speeches in 1989-92 to "educate the health care industry in making it abundantly clear that the Division will not hesitate to file criminal cases where health care providers commit per se violations."[17]

The Division launched three grand jury investigations of physi-

15. *Id.*

16. *See, e.g.*, Assistant Attorney General Charles Rule, Remarks at the Annual Meeting of the American Medical Association (Dec. 6, 1988); Chief Robert E. Bloch, Professions and Intellectual Property Section, Department of Justice, Antitrust Division, "Antitrust Enforcement and Health Care: On the Cutting Edge," Remarks at the National Health Lawyers Association (Jan. 27, 1989). *See also* Robert E. Bloch, "Antitrust Enforcement and Health Care: Current Developments and Future Trends," Remarks at the Twenty-Third Annual New England Antitrust Conference (Nov. 4, 1989); Assistant Attorney General James F. Rill, Antitrust Division, "Antitrust Enforcement Policy and the Treatment of Horizontal Price Restraints: Lessons for the Health Care Industry," Remarks at the National Health Lawyers Association (Feb. 15, 1991); Assistant Chief Gail Kursh, Professions and Intellectual Property Section, "Antitrust in the Health Care Field, A Report from the Department of Justice," Remarks at the Northern California HFMA Conferences (Sept. 23, 1992).

17. Chief Robert E. Bloch, Professions and Intellectual Property Section, Department of Justice, Antitrust Division, and Jessica N. Cohen, Trial Attorney, Antitrust Division, "Criminal Prosecution of Health Care Providers Upheld in United States v. Alston," Remarks at the National Health Lawyers Association (Feb. 19, 1993).

cians and dentists in 1988. The first investigation resulted in a civil complaint, rather than a criminal indictment, against twenty-two obstetricians and gynecologists in Savannah, Georgia who allegedly exchanged fee information, resulting in higher fees for their services. Without admitting liability, the physicians agreed to a civil consent decree issued simultaneously with the complaint, which prohibited them from engaging in the conduct in question.[18]

The second grand jury investigation was of the Massachusetts Allergy Society and some of its individual members for allegedly agreeing on fees to be charged an HMO. As with the Savannah obstetricians and gynecologists, the Division ultimately decided to file a civil suit rather than proceed criminally, and the parties simultaneously entered into a consent order.[19]

The third investigation produced a much more startling result: the criminal indictment and subsequent conviction of three dentists and two of their professional corporations in Tucson, Arizona, the first criminal indictment of a health care professional in almost thirty years.[20]

This indictment, in *United States v. Alston*, charged the three dentists with conspiring to fix and raise the copayment fees that members of four independent prepaid dental insurance plans were required to pay to the defendants and other dentists. The government alleged that, led by the three individual dentists, more than thirty dentists had sent identical letters to each of the plans for which they provided services. The form letters defended an increase in copayment fees and attached a new copayment schedule, which was twenty-five to thirty percent higher than previous ones.

James F. Rill, then Assistant Attorney General for the Antitrust Division, described the dentists' actions as follows:

> This was not a situation where a panel of providers who were part of a legitimate PPO engaged in fee negotiations with third-party payers. Instead, the independent dentists banded together for purposes of forcing a fee hike among the competing plans. Three of the plans did indeed raise copayment rates, and those higher rates are still in effect. The fourth called the federal government.

18. United States v. Burgstiner, 1991-1 Trade Cas. (CCH) ¶ 69,422 (S.D. Ga. 1991) (consent decree).

19. United States v. Massachusetts Allergy Soc'y, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,846 (D. Mass. 1992) (consent decree).

20. United States v. Alston, 1991-1 Trade Cas. (CCH) ¶ 69,366 (D. Ariz. 1990), *aff'd in part, vacated in part*, United States v. Alston, 974 F.2d 1206 (9th Cir. 1992); United States v. Alston, No. CR-10-042-Tuc (D.C. Ariz., Jan. 15, 1993) (plea agreement).

> There was never any argument made that defendants' conduct related to any form of efficiency-enhancing economic integration or that it resulted in the introduction of a new product into the market. With no economic integration and no new product, what we had was a garden variety price-fix, a *per se* illegal offense.[21]

Robert Bloch and Jessica Cohen, who prosecuted the case for the government, expressed a similar view of the case:

> *Alston* involved nothing more than garden-variety price fixing: competitors who banded together to agree on increased copayment fees and demand that the plans adhere to them. In this fundamental respect, the conduct in *Alston* is no different from agreements among competitors to fix real estate commissions, soft drink prices, or retail gasoline prices. The Government has prosecuted all of these activities criminally.[22]

In 1990, a jury convicted the dentists and their professional corporations of antitrust violations. It was the first conviction of a health care practitioner in a criminal antitrust case in fifty years and only the second conviction ever. Subsequently, the United States District Court granted Dr. Alston's motion for a new trial and granted the two other defendants' motions for acquittal on the grounds that the jury instructions were deficient and the evidence was insufficient to support the conviction.[23] The Department of Justice appealed.

In December of 1992, the Ninth Circuit announced its long-awaited decision.[24] It agreed with the district court that although the jury instructions were "technically and legally correct," they were too vague to support Alston's criminal convictions. The Ninth Circuit ordered a new trial for Alston but reversed the district judge's acquittal of the other two dentists, holding that the government made its case: "it was not irrational for the jury to conclude" "that defendants knowingly participated in an agreement to raise co-payment fees."[25] The case was remanded to the district court for further criminal proceedings against all three defendants.

The final chapter in the *Alston* case concluded in January of 1993, when Dr. Alston's corporation entered a plea of nolo contendere to the felony indictment, agreeing to pay a $5,000 fine and

21. Rill, *supra* note 16.
22. Bloch and Cohen, *supra* note 17.
23. 1991-1 Trade Cas. (CCH) ¶ 69,366.
24. 974 F.2d 1206.
25. *Id.* at 1211.

perform 250 hours of community service, which would be performed by Dr. Alston on behalf of the corporation. All charges against the three individual dentists were dropped.[26] While the Justice Department considers the Ninth Circuit's decision in the case a "significant legal victory that reaffirmed the soundness of the Government's legal theory,"[27] the Department apparently was not willing to re-try the case before the trial judge who previously entered verdicts against the government.

The Court of Appeal's decision in *Alston* has already sparked a debate over the wisdom of the government's decision to prosecute Dr. Alston criminally. Although the court endorsed the government's view that the health care industry is neither exempt from the antitrust laws nor entitled to special treatment under those laws,[28] it referred to the government's decision to indict the Tucson dentists as "elevating to the criminal level a dispute normally handled as a civil enforcement matter . . . ."[29] The court's expression of concern about the "crushing consequences of a criminal conviction on the lives and careers" of the individuals "singled out for such treatment"[30] is now being cited by those who argue that criminal antitrust prosecutions should be reserved for conduct that is clearly anticompetitive and that defendants knew to be wrong.

A more recent investigation of generic drug manufacturers in Baltimore resulted in the second indictment in the health care field since 1990. The government charged two drug companies and their presidents with conspiracy to fix drug prices.[31] One of the executives pled guilty and was sentenced to twenty-one months in jail, plus a fine. The other defendant will be tried later this year.

In mid-1990, the government initiated another grand jury probe into an alleged price-fixing scheme by Pediatric Faculty Physicians, a group of approximately ninety pediatricians in Salt Lake City who practice at both the University of Utah Hospital and the

26. D.C. Ariz. No. CR-10-042-Tuc (D.C. Ariz., Jan. 15, 1993).

27. *See* Bloch and Cohen, *supra* note 17.

28. Applying a string of cases from the *American Medical Association* case in 1943 (America Medical Ass'n v. United States, 317 U.S. 519 (1943)) to the *Indiana Federation of Dentists* case in 1986 (FTC v. Indiana Fed'n Dentists, 476 U.S. 463 (1986)), the Ninth Circuit ruled that, in antitrust cases, "[h]ealth care providers are exposed to the same liability and entitled to the same defenses as businesses in other industries." 974 F.2d at 1209. Consequently, the court concluded, "[t]he district court properly allowed the government to proceed on a per se theory" and upheld the jury instructions that price-fixing is per se illegal. *Id.*

29. *Id.* at 1214.

30. *Id.*

31. United States v. Bolar Pharmaceutical Co., Inc., Crim. No. 92-0454 (D. Md. filed Dec. 17, 1992).

Primary Children's Medical Center. The government recently broadened the scope of the investigation and is now reported to be looking into an alleged conspiracy between the two hospitals to divide up the city's pediatric care market. After more than two years, the investigation still continues; reports indicate that the University of Utah had spent close to $3 million in legal-defense fees during the protracted investigation.[32] Former Utah Attorney General Paul Van Dam[33] and his recently elected successor, Jan Graham, are reported to be seeking an end to the federal probe, which continues to cost the University on average $250,000 per month.[34]

The same grand jury is now investigating another antitrust matter that apparently developed as an offshoot of the original investigation. According to the press, "the focus of the investigation appears to be whether these and other hospitals in Utah engaged in criminal price fixing by sharing nurse salary information among themselves to avoid a nurse salary war."[35] In July of 1992, the grand jury reportedly subpoenaed salary information from most, if not all, of Utah's fifty-four hospitals. The hospitals already found the first eight months of the probe "extremely expensive."[36]

Grand jury investigations are not public, and thus, there may be other investigations currently under way. Justice Department officials recently referred to other "criminal investigations of competing [health care] providers who act jointly through their specialty society or some other *ad hoc* group to negotiate higher fees with third-party payers or otherwise pressure third-party payers to increase reimbursement."[37]

IMPLICATIONS FOR THE HEALTH CARE FIELD

In view of these grand jury investigations and the repeated warnings from highly-placed government officials, hospitals, especially

32. *U. Makes 11th-Hour Plea for Legal-Defense Fees*, SALT LAKE TRIB., Mar. 2, 1993, at B4; *Not a Hospital Bill*, SALT LAKE TRIB., Mar. 1, 1993, at A10; Mike Carter, *GOP Lawmakers Say U. Hospital's Healthy Profits Can Fund Antitrust Probe*, SALT LAKE TRIB., Feb. 27, 1993, at C2.

33. While he was the Attorney General of Utah, Mr. Van Dam also served as head of the Antitrust Committee of the National Association of Attorneys General.

34. Don Harrie and Jo Ann Jacobsen-Wells, *Van Dam, Graham Seek End to Antitrust Case*, SALT LAKE TRIB., Nov. 14, 1992.

35. *See* David Burda, *Nurse Compensation is New Target of Probe*, MODERN HEALTHCARE, Aug. 24, 1992, at 8; Paul Rolly and Jo Ann Jacobsen-Wells, *Federal Antitrust Probe*, SALT LAKE TRIB., July 8, 1992, at B1.

36. Rolly & Jacobsen-Wells, *supra* note 35.

37. Bloch, *supra* note 16.

those in markets with few competitors, must be careful not to enter into any agreement, explicit or implicit, that might be construed as price or wage fixing, market allocation, or a group boycott. For example, the government may view an agreement between hospitals to eliminate some or all of the duplication in their services as a per se illegal division of markets, even if the agreement is motivated by the understandable desire to eliminate underutilized services in the community and thus reduce costs. FTC Commissioner Mary Azcuenaga emphasized this point in a recent speech, stating that "there is a risk of serious criminal antitrust exposure of hospitals in highly concentrated markets that allocate therapeutic or diagnostic functions, even though the motive is to secure a higher rate of utilization and lower costs."[38] Hospitals must also be very careful not to reach any agreement, explicit or implicit, regarding the prices to be charged for their services or wages to be paid to their employees, especially nurses. Similarly, an agreement among competing hospitals not to deal with particular payers could be viewed as a criminal group boycott.

The message to physicians is equally clear: The government favors the development of HMOs, PPOs, and other cost-saving managed care programs. Independent physicians who act together to block or otherwise frustrate the growth of alternative delivery systems may be charged with a per se violation of the Sherman Act and exposed to criminal prosecution.[39] Physicians' dealings with and resistance to the demands of third-party payers for discounted charges pose the greatest risk of antitrust liability. Such joint action that is not part of a legitimate joint venture and is designed to thwart hard bargaining by payers involves serious criminal risk. Competing physicians face similar dangers when they form and control their own independent practice association if it does not truly constitute a legitimate joint venture.

Those who engage in per se illegal conduct of this nature need not account for a large percent of the market to violate the law. Nor do they need to be many in number: It takes only two physicians or two hospitals to constitute a conspiracy.

Although there have been only two indictments to date, the warnings have been issued and additional signs of the govern-

38. Commissioner Mary L. Azcuenaga, Federal Trade Commission, "Hospitals and Competition Policy," Remarks at the American Protestant Health Association (May 11, 1992).

39. Deputy Assistant Attorney General Charles A. James, Department of Justice, Antitrust Division, "Antitrust in the Health Care Field," Remarks at the National Health Lawyers Association (Jan 31, 1992).

ment's planned new offensive are clearly visible in other ongoing grand jury investigations. There are certain to be other investigations, which are sure to be costly and personally draining even if they do not culminate in indictments. Criminal antitrust enforcement, long a priority in other areas, is now a priority in the health care field as well.

The effects of the recent Congressional increase in antitrust fines and judicial stiffening of the maximum penalties for persons convicted of antitrust crimes are already apparent. An increasing number of the Department's investigations and cases involve conduct that is subject to both the Act and the Guidelines and are resulting in longer jail terms and higher fines. In a recent case involving price-fixing by an architectural hardware company, the court, invoking the "twice the gain or loss" alternative fine provision,[40] fined a corporate defendant $8 million, the largest fine ever imposed for a single violation of the Sherman Act.[41]

CONCLUSION

Hospitals, independent physicians, and other health care providers simply must avoid price agreements, boycotts of third-party payers, and concerted actions to divide up patients, services, or service areas that expose them to the risk of criminal liability. Naked restraints of trade that have no purpose other than to increase the economic leverage of individual competitors through collective action are per se violations of the antitrust laws.

On the other hand, where there is true economic integration and a real sharing of risk and profits, joint ventures between hospitals, physicians, hospitals and physicians, or hospitals and other businesses can be legal. If antitrust guidelines are followed, health care providers can engage in collaborative ventures without running afoul of the antitrust laws, much less the per se violations that could invite a criminal investigation.

Cooperation between and among hospitals and physicians is certain to become increasingly important in the future. Indeed, the government is on record as favoring collaborative efforts, such as joint investment in ancillary services and/or costly equipment such as MRIs, helicopters, and lithotripsy machines.[42] Perhaps the best

40. 18 U.S.C. § 3571.

41. Clark, *supra* note 3.

42. Acting Assistant Attorney General Charles A. James, Antitrust Division, Department of Justice, "Regarding Health Care Mergers in the 21st Century," Statement before the Joint Economic Committee (June 24, 1992).

evidence of this is that neither the FTC nor the Department of Justice has brought a single case challenging a legitimate joint venture in the health care sector involving true economic integration.[43] While the government's recent criminal enforcement of the antitrust laws in the health care sector is a stern warning to health care providers to avoid the notorious violations of the antitrust laws that have long been prosecuted criminally in other sectors of the economy, it should not be taken as a general alarm against the dangers of other kinds of collaborative efforts that the government and others recognize to be in the best interests of the public and health care providers alike.

The government must be given credit for trying to prepare the medical community for what lay in store. Yet, the warnings were not heard throughout the health care industry, and even today, many health care providers do not fully appreciate the risks of criminal prosecution.

Future antitrust defendants in the health care industry will no longer be among the first to be prosecuted criminally. Presumably, when the courts, antitrust counsel, and health care practitioners adjust to the changes in the health care field, in which antitrust issues will play an increasingly important role and criminal prosecution of antitrust crimes will not be new, health care professionals will be in a better position to avoid activities that carry the risk of criminal prosecution.

43. All of the cases challenging these types of arrangements have been private suits by aggrieved parties. *See, e.g.*, Key Enters. of Del., Inc. v. Venice Hosp. 919 F.2d 1550 (11th Cir. 1990), *vacated, rehearing granted*, 1992-2 Trade Cas. (CCH) ¶ 70,040 (11th Cir. 1992); Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990); Hassan v. Independent Practice Assoc., P.C., 698 F. Supp. 679 (E.D. Mich. 1988); Capital Imaging Assoc. P.C. v. Mohawk Valley Medical Assocs., 725 F. Supp. 669 (N.D.N.Y. 1989) (dismissing plaintiff's Section 2 claim); Capital Imaging Assoc. P.C. v. Mohawk Valley Medical Assocs., 791 F. Supp. 956 (N.D.N.Y. 1992) (granting defendants' motion for summary judgment on plaintiff's Section 1 claim).