UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HOSPITAL ASSOCIATION OF GREATER DES MOINES, INC.; BROADLAWNS MEDICAL CENTER; DES MOINES GENERAL HOSPITAL COMPANY; IOWA LUTHERAN HOSPITAL; IOWA METHODIST MEDICAL CENTER; MERCY HOSPITAL MEDICAL CENTER, DES MOINES, IOWA, Defendants.	Filed: 9/22/92 Judge Vietor Civil Action No. Filed 4-92-70648

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On September 22, 1992, the United States filed a civil

antitrust complaint alleging that defendants named above conspired unreasonably to restrain competition among themselves, by agreeing to limit the types and amounts of advertising in which they would engage, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This conspiracy diminished competition between these hospitals for patients, physician referrals, and third-party contracts, and deprived patients, physicians, and third-party payers of information necessary for them to make informed choices on the selection of hospitals and of the benefits of free and open competition in the sale of hospital services.

The Complaint alleges that, beginning at least as early as October 26, 1989, and continuing until the date of the Complaint, defendants violated the Sherman Act by agreeing that each hospital would limit its advertising expenditures to 1/3 of 1% of its respective previous year's operating expenses, and would refrain from engaging in certain types of competitive advertising about the quality of services provided by its hospital. Specifically, each hospital agreed to refrain from engaging in advertising that included quality comparisons or that would be considered image building or self-aggrandizement. This agreement was set out in a document entitled "Guidelines on Advertising" which was adopted by the

defendants on October 26, 1989. The Complaint further alleges that defendants agreed that each hospital would establish and adhere to an internal operating policy in conformance with the guidelines' provisions limiting advertising expenditures and restricting the use of certain types of competitive advertising.

The relief sought in the Complaint is to enjoin defendants for a period of 10 years from continuing or renewing their agreement or from engaging in any other agreement or arrangement having a similar purpose or effect. The Complaint also seeks to require defendants to institute a compliance program to ensure that defendants do not enter into or participate in any plan, program, or other arrangement having the purpose or effect of unreasonably restraining competition among the hospitals in Polk County.

Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for further proceedings which may be required to interpret, enforce, or modify the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF THE PRACTICES INVOLVED IN THE ALLEGED VIOLATION

At trial, the Government would have contended the following:

1. Hospital Association of Greater Des Moines, Inc.,

("HAGDM") was incorporated in 1976 and is a trade association for general and specialty hospitals located in Polk County, Iowa. HAGDM is a nonprofit corporation located in Des Moines, Iowa, whose current membership includes six of the seven acute-care hospitals located in Polk County, including the other defendants named herein and the Department of Veterans Affairs Medical Center in Des Moines.

2. Broadlawns Medical Center ("Broadlawns") is a 214-bed, county public hospital located in the downtown section of Des Moines, Iowa. Broadlawns is a member of HAGDM and its Chief Executive Officer ("CEO") serves as a director of HAGDM.

3. Des Moines General Hospital Company ("DMGHC") is a nonprofit corporation that operates Des Moines General Hospital ("DMGH"). DMGH is a 150-bed, acute-care, osteopathic hospital located in Des Moines, Iowa. DMGH is currently managed by Quorum Health Resources, Inc., which is located in Nashville, Tennessee. The management agreement with Quorum Health Resources is scheduled to expire in 1993. DMGH is a member of HAGDM and its COO serves as a director of HAGDM.

4. Iowa Lutheran Hospital ("ILH") is a 333-bed, acute-care, nonprofit hospital corporation located in Des Moines, Iowa. Fairview Hospital & Healthcare Services, Inc., which is located in Minneapolis, Minnesota, is the sole member

of ILH. ILH is a member of HAGDM and its CEO serves as a director of HAGDM.

5. Iowa Methodist Medical Center ("IMMC") is a 680-bed, acute-care, nonprofit hospital corporation located in Des Moines, Iowa. Iowa Methodist Health System, Inc., which is located in Des Moines, Iowa, is the sole member of IMMC. IMMC is a member of HAGDM and its CEO serves as a director of HAGDM.

6. Mercy Hospital Medical Center ("Mercy") is a 520-bed, acute-care, nonprofit hospital corporation located in Des Moines, Iowa. Mercy Health Center of Central Iowa, Inc., which is located in Des Moines, Iowa, is the sole member of Mercy. Mercy is a member of HAGDM and its CEO serves as a director of HAGDM.

7. The five above-named hospitals [hereinafter referred to as defendant hospitals] are or operate general acute-care hospitals in Polk County, Iowa, that provide a variety of services in connection with the diagnosis, care, and treatment of patients. These defendant hospitals compete with each other for patients residing in Polk County and nearby areas. With the exception of one small hospital and the Department of Veterans Affairs Medical Center, the defendant hospitals are or operate the only general acute-care hospitals in Polk County.

8. General acute-care hospitals, including defendant hospitals, compete for patients on the basis of price, quality, and services. Such hospitals endeavor to increase admissions by attempting to influence patients in their choice of facility, by trying to persuade physicians to refer patients to their facility, and by contracting with third-party payers who can influence hospital utilization of their enrollees. General acute-care hospitals strive to increase admissions, in part, by using advertising to inform patients, physicians, and third-party payers about the price, quality, and range of services offered by their hospital.

9. Consumers of inpatient hospital services often have limited information about hospitals and, therefore, rely in part on advertising to learn about the quality, price, and range of services offered by hospitals in their geographic area. Hospital advertising is increasingly being used to provide this information in a format that consumers can understand. When information is made available to consumers, they can more easily select, or assist their physician in selecting, the hospital that best meets their needs. Hospitals are thereby encouraged to compete to provide the types and quality of services that consumers and physicians desire at a reasonable price.

10. Beginning at least as early as October 26, 1989, defendants have combined and conspired to restrain competition in violation of Section 1 of the Sherman Act. The combination and conspiracy consists of a continuing agreement, understanding, and concert of action among defendants whereby each defendant hospital is to limit the types and amount of advertising in which it engages, thus diminishing competition between the defendant hospitals for patients, physician referrals, and third-party contracts. On October 26, 1989, the defendant hospitals adopted the "Guidelines on Advertising," a document prepared under the auspices of HAGDM. In adopting these guidelines, defendant hospitals agreed to limit their advertising expenditures to 1/3 of 1% of their respective previous year's operating expenses, and to refrain from engaging in certain types of competitive advertising, including quality comparisons, claims of prominence, image building, or self-aggrandizement.

11. In furtherance of this combination and conspiracy, defendants also agreed that each defendant hospital would establish and adhere to an internal operating policy limiting its advertising expenditures and restraining it from engaging in those types of advertising prohibited by the agreement. The actions of defendants far exceeded any reasonably limited undertaking to restrain false and deceptive advertising.

12. This combination and conspiracy had the effect of unreasonably restraining price and quality competition among defendant hospitals for the sale of hospital services to patients and third-party payers, and for physician referrals. The combination and conspiracy deprived patients, physicians, and third-party payers in Polk County of information needed by them to make informed choices on the selection of hospitals and of the benefits of free and open competition in the sale of hospital services.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission by any party with respect to any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that such entry is in the public interest. Section XI of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that defendant hospitals reach independent decisions regarding the amount each defendant hospital expends to advertise its hospital services and the types of such advertising each defendant utilizes, and that defendant HAGDM does not act as a conduit to encourage joint agreements on advertising.

A. Prohibitions and Obligations

Under Section IV of the proposed Final Judgment, each defendant is enjoined and restrained from entering into, directly or indirectly, any contract, agreement, understanding, arrangement, plan, program, or course of action with any hospital in the Des Moines area or any Des Moines area hospital association to limit or regulate the types or amounts of advertising by any hospital in the Des Moines area. The "Des Moines area" is defined in Section III as Polk County, Iowa.

Section V provides that nothing in the Final Judgment prohibits any defendant from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency, legislative body, or other governmental agency concerning legislation, regulatory actions, or governmental policies or actions relating to advertising by hospitals.

Section VI requires each defendant to maintain an antitrust compliance program. Section VI provides that this program at a minimum shall include: (A) distributing, within 60 days from the entry of the Final Judgment, a copy of the Final Judgment to all directors, officers, and management employees; (B) notifying, within 60 days from the entry of the Final Judgment, all directors, officers, and management employees that the defendant will not be bound by HAGDM's "Guidelines on Advertising," dated October 26, 1989; (C) distributing in a timely manner a copy of the Final Judgment to any person who succeeds to a position as director, officer, or management employee; (D) holding a briefing annually for all directors, officers, and management employees on certain topics related to the Final Judgment and the antitrust laws; and (E) maintaining for inspection by plaintiff a record of the directors, officers, and management employees who attend each annual briefing. The annual briefing will be held to educate them on (1) the meaning and requirements of the Final Judgment including the consequences of noncompliance with the Final Judgment and (2) the application of the antitrust laws to the defendant's activities including potential antitrust concerns raised by hospitals (a) engaging in agreements or arrangements to allocate services, equipment, or facilities or any other

joint activities, and (b) exchanging of competitive information such as contemplated or expected changes in prices or employees' salaries or benefits. "Management employee," as defined in Section III, includes any employee who supervises the preparation of or approves any price, rate, or discount schedule; any wage, salary, or employee benefit schedule; any budget or financial plan; any marketing or advertising plan; any long range or strategic plan; or any plan to acquire materials, equipment, or services.

Section VII requires various certifications of defendants. Section VII(A) requires each defendant to certify to plaintiff within 75 days after the entry of the Final Judgment whether defendant has made the distribution and notification required by Section VI of the Final Judgment. Section VII(B) requires each defendant to certify to plaintiff annually for 10 years after the entry of the Final Judgment whether defendant has complied with the provisions of Section VI of the Final Judgment.

Section VIII(A) provides that an authorized representative of the Department of Justice may visit defendants' offices, after providing reasonable notice, to review their records and to conduct interviews regarding any matters contained in the Final Judgment. Defendants may also be required to submit written reports, under oath, pertaining to the Final Judgment.

B. Scope of the Proposed Final Judgment

Section II of the Final Judgment provides that the Final Judgment shall apply to each defendant and to each of its officers, directors, agents, employees, successors, and assigns and to all other persons in active concert or participation with any of them who receive actual notice of the Final Judgment by personal service or otherwise.

Section X of the proposed Final Judgment provides that the Final Judgment shall remain in effect for 10 years.

C. Effect of the Proposed Judgment on Competition

The relief in the proposed Final Judgment is designed to ensure that each defendant hospital, using its independent judgment, decides unilaterally the amount it expends on advertising and the types of advertising it utilizes, and that neither HAGDM nor the defendant hospitals undertake any collective activity or arrangement to limit or regulate such advertising. It is also designed to ensure that patients, physicians, and third-party payers have the opportunity to receive information necessary for them to make informed choices on the selection of hospitals and to benefit from lower prices or increased quality that would result from competition among the hospitals.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the Complaint is based and to remedy the effects of the alleged agreement.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the judgment has no prima facie effect in any subsequent lawsuits that may be brought against defendants in this matter.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided in Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), any person believing that the proposed Final Judgment should be modified may submit written comments to Robert E. Bloch, Chief, Professions and

Intellectual Property Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Room 9903, Judiciary Center Building, Washington, D. C. 20001, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. Section IX of the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial of the case. In the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted since the proposed Final Judgment provides the relief that the United States sought in its Complaint.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John B. Arnett, Sr., hereby certify that a copy of the Competitive Impact Statement in United States v. Hospital Association of Greater Des Moines, Inc., et al. was served on the 22nd day of September 1992, ~~first class mail~~ personally, to counsel as follows:

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