



# DEPARTMENT OF JUSTICE

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## THE IMPORTANCE OF ANTITRUST IN HEALTH CARE

Address by

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I always love the chance to come out west; I feel invigorated whenever I get out here. You may not know that I am a fourth generation Arizonan. I was born in Jerome, a small mining town in northern Arizona, grew up in Phoenix, went to college and law school in California and then lived and worked in Santa Fe, New Mexico, from 1969 to 1983. I have often been to Salt Lake to argue cases before the Tenth Circuit and to litigate, and I am proud to claim John Flynn as one of my oldest and dearest friends. Salt Lake is one of my favorite places in the West, and whenever I come here, I feel as though I am coming home.

It may be my western roots that make me an unabashed supporter of vigorous antitrust enforcement. The antitrust laws are about creating opportunity, about having an open economy where people and businesses with visions can pursue and develop those visions without fear of unfair exclusion. And this commitment to openness and opportunity is what the West is all about.

The West is about looking toward the horizon and seeing, not a limit, but a challenge. I think of those lines of Conestoga wagons patiently working their way along the Oregon Trail, across the arid prairies and through snowy mountain passes, whole families bouncing along with all their belongings and all their hopes -- and yes, all their fears and uncertainties -- toward the horizon. There were hardships and failures, as there are in the pursuit of any vision -- think of the Donner party and the frightful price they paid for being a day late in crossing the Sierras. But many more people than not reached the West and a new life. The Mormons, in particular, wrote an important chapter in the history of the West. The victims of religious persecution -- unfortunately, on our own shores -- the Mormons pushed their carts from Missouri, settled here in the Great Salt Lake Valley and literally made the desert bloom.

The early pioneers -- Mormons and others -- were just the first of many who came west in search of opportunity. Will Rogers once said, in the thirties, that he had recently attended an Old Settlers meeting in California; to qualify for membership you had to have been in the state for two and a half years. You in Utah, and we in New Mexico, understand that! Today, Utah and the other states of the western interior are the fastest growing in the country.

The allure of the West is nothing more than the allure of America, magnified. Americans by definition are people who reject the notion that who you are at birth defines what you will become or what you can achieve. Our forebears rejected the closed societies of their birth to come to a land where the boundaries of possible achievement were as expansive as the content of their characters. They built great cities where there had been wilderness. And they built a nation energized by the strongest, most dynamic economy the world has ever known.

That is what built America -- that constant striving, that refusal to accept things as they are when they could be so much better. We are a nation that cherishes the freedom to reach beyond our grasp, a freedom that is both political and economic.

That fundamental aspect of our national character -- exemplified by the settlement of the West -- underlies the antitrust laws. Senator John Sherman, speaking in 1890 in support of the Act that bears his name, explicitly drew the connection between a free people and a free economy: "If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with

power to prevent competition and to fix the price of any commodity."

America, with passage of the Sherman Act, was the first nation to enact antitrust legislation. Though virtually unprecedented, the statute enjoyed widespread support in the United States. In the 1888 presidential election, all the major political parties had antitrust planks in their platforms. Over the past 104 years, even as the level of antitrust enforcement occasionally has varied in degree, our nation has never questioned its fundamental commitment to an open economy -- that is, one unfettered by "autocrats of trade with the power to prevent competition" -- and it is a commitment shared passionately by both political parties. To demonstrate that, let me cite one important example. The Department of Justice in the Ford Administration in 1974 filed the AT&T case, and the effort to dismantle AT&T's telecommunications monopoly was pursued during three administrations, both Republican and Democratic, before Bill Baxter successfully concluded the case with the break-up of AT&T during the Reagan Administration. The case is an historic achievement of the Antitrust Division and a wonderful example of the truly bipartisan and nonpartisan nature of antitrust enforcement.

Fostering competition through intelligent, vigorous and nonpartisan antitrust enforcement is more important than ever for the United States. In today's increasingly global and technological marketplace, our firms must be tested and hardened by domestic rivalry if they are to compete and succeed abroad. The importance of antitrust enforcement does not diminish in the health care context. Indeed, antitrust enforcement has a critical role to play in promoting a system that provides American consumers with the best quality service at the lowest prices. Health care expenditures account for about one seventh of Gross Domestic Product, and the health

care industry employs over 9 million people. It would be nonsensical to suggest that the fundamental organizing principle of our economic system -- competition -- somehow does not apply to this vital sector of the economy.

At one time, the belief prevailed that the antitrust laws did not apply to the medical profession, based on the notion that there was a "learned profession" exemption embedded in the antitrust laws. That time has long since passed. The courts and Congress have made it clear that the health care industry, like virtually every industry, is subject to the antitrust laws.

American consumers have been the beneficiaries. For example, enforcement of the antitrust laws contributed directly to the development of innovative health care delivery systems. Some providers initially boycotted these systems, such as managed care plans, in no small part because they increased price competition among providers. Antitrust challenges ended these boycott attempts; the result for consumers was greater choice in health care. Likewise, the antitrust laws have provided a mechanism for stopping price fixing efforts by competing providers.

In addition to halting anticompetitive conduct, antitrust enforcement protects competition through the review of proposed mergers. Although many mergers offer benefits to consumers by increasing the parties' efficiency and lowering prices, some mergers pose unacceptable threats of concentrating economic power and reducing competition. The latter type of merger can harm consumers through higher prices or reduced quality of service, or both. In some cases, otherwise lawful transactions may have anticompetitive aspects that can be pruned, allowing the merger to go forward with less potential for harming competition. Intelligent merger enforcement in the health care area, as in other areas, allows

procompetitive (or neutral) mergers while preventing or restructuring transactions that will reduce competition.

In the context of these general observations, I would like to highlight briefly three recent enforcement actions by the Department of Justice that have promoted health care competition. The first is the Department's joint action in June with the Attorney General of Florida to challenge a merger of two hospitals near Tampa, Florida. The two hospitals, Morton Plant and Mease, are the largest in their service area, together accounting for 58 percent of all general acute care hospital beds available to consumers. The complaint alleged that the merger, if it had been allowed to occur, would have substantially increased market concentration and would have allowed the merged entity to dominate the market for the provision of acute inpatient hospital services in that area. The vigorous competition that existed between Morton Plant and Mease would have been a thing of the past. The Department and the Florida AG concluded that a full-fledged merger would have eliminated the rivalry, significantly reduced the ability of managed care plans to bargain for competitive rates and allowed the combination to raise prices for acute inpatient hospital services to the detriment of health care purchasers and consumers.

We believed that the merger as proposed was manifestly anticompetitive. After reviewing the situation, however, the Department determined that there were some respects in which Morton Plant and Mease either do not compete or, although they compete, enough alternatives are available that the combination would not harm competition. Areas in which the hospitals do not compete include highly specialized, expensive procedures such as open heart surgery, which Morton Plant offered but Morton did not. Areas in which sufficient alternatives are available include outpatient services and laboratory services. The Department, along with the Florida

Attorney General, reached a settlement with the hospitals that will allow consolidation in those areas where competition will not be adversely affected, but will retain separate, competitive operations in all other areas. The settlement also requires that all marketing, managed care contracting and pricing decisions remain independent.

This settlement represents an innovative and intelligent use of the antitrust laws to protect competition. For consumers, the settlement is a "double win." First, it preserves the vigorous rivalry between the two hospitals where it matters most, thereby insuring that consumers continue to reap the benefits of competition in the form of lower prices and better services. Second, it permits the hospitals to achieve substantial cost savings by combining and jointly operating services for which there are competitive alternatives; the preservation of competition insures that the cost savings will be passed on to consumers.

The second case is one with which many of you may be familiar -- our challenge of an alleged agreement among Salt Lake City hospitals artificially to hold down the wages for registered nurses. The Department alleged that the hospitals compete with each other in recruiting and hiring nurses and together purchase about 75 percent of the registered nursing services in Salt Lake County. The complaint alleged that to hold down the wages paid to nurses, the hospitals routinely exchanged nonpublic current and prospective information on nurses' wages. The effect of this conduct, we alleged, was to deprive registered nurses in Salt Lake County and elsewhere in Utah of the benefits of free and open competition in the purchase of registered nursing services. The consent decree we obtained from the defendants will insure that nurses' wages in Salt Lake County will be set by the free market.

Finally, the Department recently announced the settlement of a complaint brought jointly with the Arizona Attorney General against Delta Dental Plan of Arizona. The complaint alleged that Delta is the dominant dental insurer in Arizona and has provider contracts with about 85 percent of that state's dentists. Until the Department sued Delta, each of those provider contracts contained a "Most Favored Nation" clause, which required the dentist to charge Delta the lowest price that the dentist charged any patient or competing dental plan. Treatment of patients covered by Delta accounts for a significant portion of the income of most participating Delta dentists. According to the complaint, most of these dentists are in independent, private practice and actually or potentially compete with other participating Delta dentists to provide dental services to both Delta and non-Delta patients.

Although one might think that such MFN clauses would lead to lower prices, the actual effect of the MFN clauses when used by a dominant insurer such as Delta is to require participating dentists to charge other dental plans and patients fees that are as high as or higher than the fees the dentists charge to the dominant insurer. The complaint alleged that the MFN clauses restrained price competition among Arizona dentists, because they caused large numbers of dentists to refuse to discount their fees. Before Delta began to enforce the MFN clauses strictly, according to the complaint, many Arizona dentists chose to reduce their fees to participate in various managed care and other discount plans that competed with Delta and with each other.

We concluded that after Delta began enforcing the MFN clauses, most dentists refused to discount their fees to non-Delta patients or competing discount dental plans, because they quite simply could not afford what for many of them would be an across-the-board discount. Consequently, our view was that the MFN clauses substantially restrained discounting that



was occurring and discounting that otherwise would have occurred but for the clauses. Delta's vigorous enforcement of the MFN clauses caused dentists to drop out of competing discount plans and caused other dentists not to join such plans. As a result, the competing discount plans were unable to attract or keep a sufficiently large, qualified and geographically varied panel of dentists to serve adequately their members and make their plans commercially marketable to employers and other potential patient groups. The proposed final judgment insures that Delta eliminates its MFN and stops all similar practices that we concluded unreasonably restrain competition among dentists and dental care plans in Arizona.

In addition to these recently concluded enforcement efforts, we currently have more than 20 open civil investigations in the health care arena. Moreover, Department attorneys are in trial in Dubuque, Iowa, challenging a merger that we have concluded would substantially lessen competition among hospitals in that city. This level of enforcement activity vividly illustrates the need for application of the antitrust laws to protect and promote competition in the health care industry. In the debate over health care reform, however, some special interests have suggested that the antitrust laws also need to be "reformed" to accommodate changes in the health care system -- by reform, they mean the creation of antitrust exemptions for them. Creating such exemptions would be an error of immense proportions.

Although consensus was lacking on virtually every aspect of health care reform, there was remarkably widespread agreement that increased competition in the health care industry is essential to holding down escalating health care costs. This agreement on the need for competition rests on the bedrock foundation of our national economic history. An indispensable element of competitive markets is vigorous antitrust enforcement. Thus, the creation of antitrust

exemptions would be fundamentally irreconcilable with the broad national agreement on the need for more competition in the health care industry.

The purported rationales for antitrust exemptions do not withstand scrutiny. One such rationale is that the antitrust laws need to be relaxed to allow participants in the health care industry to achieve greater efficiency. The antitrust laws, however, do not impede the achievement of greater efficiency. In fact, competition protected by antitrust enforcement is the most powerful impetus to greater efficiency. It is ironic, to say the least, to argue that an industry in need of greater efficiency should be exempted from laws whose very purpose is to promote economic efficiency. The reality is that the fear of being left behind by competitors is a greater spur to increased efficiency than is the complacency bred of stable market power.

A variant on this rationale is that the antitrust laws are too harsh, preventing joint activities and mergers that are good for the industry. I have trouble understanding this claim in the context of the facts. The fact is that neither the Department of Justice nor the Federal Trade Commission has ever challenged a hospital joint venture. We and the FTC challenge only an exceedingly small portion of the vast number of mergers that occur in the health care industry. Our record is by no means overly aggressive. And as the Morton Plant case demonstrates, the antitrust laws are sufficiently flexible to allow the tailoring of mergers to achieve efficiencies without hurting competition.

An alternative rationale in support of antitrust exemptions is the claim that the laws' application to health care activities is unclear; participants in the health care industry need greater certainty. I acknowledge that the antitrust laws are flexible and that they are adaptable to

changing circumstances. But this flexibility and adaptability are strong assets, rather than liabilities. Indeed, Congress wrote the antitrust laws in a general manner to allow their application sensibly in myriad circumstances. Because similar conduct in different circumstances can have different competitive effects, the antitrust laws' lack of specificity has served us well over the years. The courts and enforcement agencies have very ably given content and consistency to the broad outlines sketched by Congress. The fact that so many segments of our economy have prospered while subject to the antitrust laws rebuts the notion that an antitrust exemption is needed to provide sufficient certainty for businesses to operate successfully.

As part of their effort to ensure consistent and predictable application of the antitrust laws to the health care industry, the Department and the FTC jointly have issued statements of enforcement policies and analytical principles relating to health care and antitrust. These statements, first issued in 1993 and revised and expanded just last week, were drafted after extensive discussions with industry participants. As expanded, the statements cover nine basic topics:

- (1) mergers among hospitals;
- (2) hospital joint ventures involving high-technology or other expensive equipment;
- (3) hospital joint ventures involving specialized clinical or other expensive health care services;
- (4) providers' collective provision of non-fee-related information to purchasers of health care services;

- (5) providers' collective provision of fee-related information to purchasers of health care services;
- (6) provider participation in exchanges of price and cost information;
- (7) joint purchasing arrangements among health care providers;
- (8) physician network joint ventures; and
- (9) analytical principles relating to multiprovider networks.

Among other things, the statements establish specified safety zones within which conduct is *per se* legal.

In addition to the statements, the two agencies have obligated themselves to respond in an expedited manner to business review or advisory opinion requests in the health care industry. Although the health care statements eliminate much uncertainty, they are of necessity general. The business review letter procedure thus provides a timely mechanism for companies to obtain a more specific statement of enforcement intentions from the agencies. Over the past year, the two agencies have issued approximately 20 business reviews and advisory opinions, and we have close to double that number currently under consideration. Almost all of the reviewed arrangements have been approved.

In conclusion, let me reiterate my fundamental belief that America's longstanding commitment to open, competitive markets is the source of her economic strength. As change comes, one way or another, to the health care area, all Americans will be better off with more, rather than less, competition. Vigorous, intelligent antitrust enforcement must -- and I believe will -- play a vital role in promoting that competition.