



Bureau of Competition
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 12, 1985

B. Ward Lane, M.D.
President
North Texas Chapter
American College of Surgeons
3600 Gaston Avenue, Suite 904
Dallas, TX 75246

Dear Dr. Lane:

This is in response to your letter of October 21, 1985 regarding the antitrust implications of various proposed uses of an already completed fee survey conducted by the North Texas Chapter of the American College of Surgeons ("ACS"). According to your letters and our telephone conversations, the ACS has conducted a survey of fees charged by its 658 member surgeons, representing approximately 50 percent of the surgeons practicing in northern Texas. The purpose of the survey is to provide information to interested persons, such as ACS members, insurers, HMOs, hospitals, governmental agencies, and patients, regarding the range of fees charged for the ten most common surgical procedures in each surgical speciality. One anticipated use of the survey is to facilitate individual negotiations between surgeons and third-party payers in establishing reimbursement levels. Although the ACS has not yet decided exactly how to distribute or make available the survey, you mentioned that one method might be to send letters to the various interested parties, such as third-party purchasers and the member surgeons. Another method might be to arrange for an article to be published in local newspapers.

Based on the information provided in your letter, distribution of the fee survey does not appear to raise significant antitrust issues. As I discussed in my earlier letter, the antitrust laws forbid agreements among competitors or their agents that fix, formulate or interfere with prices, fees, or otherwise unreasonably restrict terms of trade. Depending on the purpose and effect, the collection and exchange of price information by an organization of competitors can constitute or facilitate an unlawful agreement to set or regulate prices. From your description of the ACS survey, its distribution may enhance, rather than restrict, competition. First, the stated

purpose for conducting a survey -- to enhance individual bargaining between surgeons and third-party payers by providing a data base for all parties -- is legitimate and may promote price competition among surgeons. Second, certain aspects of the survey and your plans for its distribution make it unlikely that price uniformity is intended or anticipated. The survey results, by reflecting a range of fees, are not as likely to serve as a guide for uniform pricing as would one specific price. Also, the survey's availability to buyers and sellers is consistent with enhancing the procompetitive benefits of data sharing. Additionally, the survey appears to impose no commitment to comply with its results, i.e., no one is expected to take any action as a result of the survey findings. Given these facts, and in light of the stated purpose and the generally unconcentrated nature of surgical markets, the distribution of the survey does not appear likely to violate the Federal Trade Commission Act.

Continued care should be exercised to insure that the survey's purpose remains legitimate and that it does not produce anticompetitive effects. For example, antitrust concerns would be raised if it appeared that the survey was being used for collectively affirming the "legitimacy" of fees that fall within a particular range, which could suggest collusion among the ACS members. Similarly, if the survey results were used to create collective pressure on third-party payers to reimburse at certain levels, a law violation might be found. In this regard, the ACS should be particularly careful should it choose to provide information directly to third-party payers at the request of individual surgeons. Such conduct could, under certain circumstances, indicate that the ACS is acting as the representative of its members in defining fee levels.

In sum, although the ACS's conduct does not appear to raise any serious antitrust concerns, the Bureau of Competition retains the right to reconsider the questions involved, and, with notice to ACS, to rescind or revoke its opinion if the survey results in substantial anticompetitive effects, if the survey is used for improper purposes, or if it would be in the public interest to do so. Finally, the above legal advice is that of the Bureau of Competition only. Under the Commission's Rules of Practice, Section 1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time.

Very truly yours,



Nina B. Hale
Attorney