

# COMMISSION APPROVED

FEDERAL TRADE COMMISSION  
Chicago Regional Office



Suite 1437  
55 East Monroe Street  
Chicago, Illinois 60603  
Area Code 312 353-4123

June 11, 1986

The Honorable Emil Jones, Jr.  
Senator, 17th District  
611C Capitol Building  
Springfield, Illinois 62706

Dear Senator Jones:

The Federal Trade Commission's Chicago Regional Office and Bureaus of Competition, Consumer Protection, and Economics are pleased to have the opportunity to respond to your letter of June 6, 1986 requesting our comment on Senate Bill 2202.<sup>1</sup> Our comments are limited to Article II of the bill. In essence, the bill would authorize physicians to combine and jointly determine the price at which they will participate in PPOs, HMOs and a wide variety of health care programs offered by third party payers. Thus, SB 2202 is designed to shield activities that typically are forbidden by the antitrust laws. By eliminating the application of these laws, the proposed legislation has the potential to harm competition and increase the prices consumers pay for health care. As we discuss below, it is unwise and unnecessary to exempt physicians from antitrust scrutiny. We believe that consumers will best be served by competition as fostered by existing antitrust laws, and that these laws can and do protect the legitimate interests of health care providers in the marketplace.

Section 2-1 of SB 2202 states that its first purpose is to permit physicians and their representatives to discuss, consider, comment, and advise upon terms and provisions of proposed contracts for medical services. But the bill goes further. SB 2202 erects a regulatory system in which a Medical Services Contracting Board ("the Board") licenses, supervises, and regulates the activities of large groups of competing physicians

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<sup>1</sup> These comments represent the views of the Chicago Regional Office and the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their presentation.

as they jointly negotiate how much to charge for their services.<sup>2</sup> When physician groups, through their representatives, have conferred and reached a proposed accord with an offeror, the Board then reviews the contract and approves it if it contains no terms prohibited by the bill and it is "reasonable." Under this proposed system, the price of health care is determined not by competition in the marketplace but by agreement among competitors, subject to the limited review of a governmental authority.

From a policy perspective we find SB 2202's proposed regulatory scheme to be very troubling. Illinois can, of course, impose regulation that displaces competition and, under the "state action" doctrine, effectively immunize the private parties subject to such regulation from liability under the federal antitrust laws.<sup>3</sup> As a general principle, however, we believe that it is unwise to create special antitrust rules for specific industries. Exemption from the antitrust laws should only be granted when there is compelling evidence that competition is unworkable. We are aware of no such evidence here. In fact, it is becoming increasingly clear that competition has an important role to play in the health care field. As health care costs have escalated, both private interests and policymakers at all levels of government have shown an increasing tendency to adopt a competitive approach to help promote a more efficient health care system. This increasing reliance on competition suggests that now is not the time to reduce competition by creating special antitrust exemptions for competitors in health care markets.

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2 Section 2-7 of SB 2202 states that annual representation licenses shall be granted to not-for-profit corporations, associations, societies, or foundations that retain 30% or more of the persons licensed to practice medicine within the geographic area consisting of one or more contiguous Illinois counties.

3 Pursuant to the state action doctrine, the federal antitrust laws do not apply to acts taken by a state as sovereign if it chooses to displace competition with regulation. A state may displace competition in a particular market by enacting a statute that clearly articulates and affirmatively expresses such a policy and by providing active governmental supervision of the private parties' activity. See, e.g., Southern Motor Carriers, Inc. v. United States, 105 S. Ct. 1721 (1985); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Parker v. Brown, 317 U.S. 341 (1943).

The benefits that competition can bring to the health care sector are nowhere more evident than in the development of innovative contracts for the provision of medical services. These contractual arrangements have arisen as a result of strong consumer demand for cost-effective forms of health care. There is no question that the competition generated by preferred provider organizations, health maintenance organizations and similar arrangements can reduce medical costs. Indeed, just last year the State of Illinois endorsed such competition with the Health Care Reimbursement Reform Act of 1985. This progress could now be undone by the state-regulated price fixing permitted by SB 2202. It is our belief that the delivery of medical services is more likely to respond to consumer demand if health care is allowed to remain freely competitive under the antitrust laws. Competition, nurtured by the increasingly vigorous antitrust enforcement in the health care sector, offers the best prospect for affordable and accessible health care in Illinois.

Moreover, we see very little to be gained by the sacrifice of competition in SB 2202, because physicians do not need protection from competitive market forces in order to make informed business decisions. Nothing in the antitrust laws prohibits physicians from informing themselves of the advantages and disadvantages of particular health-care contracts. Indeed, under the antitrust laws, physicians already are free to discuss and evaluate such contracts. What the antitrust laws do prohibit are agreements among competitors to fix prices or to coerce customers into dealing on certain terms. See, F.T.C. v. Indiana Federation of Dentists, 54 U.S.L.W. 4531 (June 2, 1986) (affirming 101 F.T.C. 57 (1983)); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); Michigan State Medical Soc'y, 101 F.T.C. 191 (1983). Since anticompetitive activities do not further physicians' understanding of proposed contracts and physicians' discussions of these arrangements are already permitted, SB 2202 appears unnecessary to its basic purpose.

Finally, while SB 2202 is unnecessary to help inform physicians, the bill could represent a significant hazard by actually increasing their exposure to antitrust liability. The bill seeks to preserve the offeror's choice between submitting to regulation or taking advantage of competition. The Board's authority to review contracts is limited to those which the offeror has chosen to negotiate with the physicians' representative. Some offerors may be reluctant to deal with an entity that possesses the market power of a large combination of competitors. But the bill authorizes physicians to meet and discuss with their representative the terms of any contract that might affect them. Their potential power to seek higher prices

will give physicians a strong incentive to combine behind the society or association that represents them. Hence, the bill encourages communications and meetings among physicians, thereby facilitating agreements among these competitors, even when the state has chosen not to regulate the result. These meetings will not be protected from antitrust scrutiny because the activity fails to satisfy the state action doctrine's requirement that competition be affirmatively displaced by regulation.<sup>4</sup>

Illinois has taken important steps to strengthen competitive forces in the health care sector. All evidence indicates that this new competition can produce much-needed gains in efficiency and cost control. Illinois should not retreat from these promising efforts by insulating physicians from competition in the marketplace and exempting them from the antitrust laws, which foster and protect that competition. We appreciate this opportunity to provide our views on SB 2202.

Very truly yours,



William C. MacLeod  
Director  
CHICAGO REGIONAL OFFICE

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<sup>4</sup> The fact that the Board monitors physicians' communications is inadequate to provide antitrust protection when the Board is powerless to control the result. As the Supreme Court warned in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980), a state cannot frustrate the national policy in favor of competition by casting a "gauzy cloak of state involvement" over what is essentially private anticompetitive conduct.