OPINION

■ ANTITRUST

Iffy prognosis for intern suit

By Gordon Schnell SPECIAL TO THE NATIONAL LAW JOURNAL

IN A LAWSUIT filed last month in federal district court in Washington, D.C., a group of medical residents has challenged on antitrust grounds the National Resident Matching Program (NRMP), the long-standing system that matches medical students with residency programs. *Jung v. Association of American Medical Colleges*, which could ultimately drag into court up to 1,000 of the country's top hospitals, has sent a shiver through the health care industry. A win for the residents could place the entire industry in financial turmoil. But that win is far from certain.

Under NRMP, fourth-year medical students and training hospitals enter into an annual computerized mating dance. Proponents claim that NRMP results in the most efficient and competitive allocation of student-residency couples. But residents view the program as nothing but a device employed by hospitals to eliminate competition in their search for residents, resulting in low wages, horrendous hours, menial labor and poor patient care.

The residents may have something here. But to make an antitrust case, they will have to overcome a major stumbling block: the tendency by courts to view conduct that arises outside of a pure commercial setting with special solicitude under the antitrust laws.

Yes, the antitrust laws are about protecting competition. And yes, certain competitive restraints are so likely to harm competition that they should be stricken with little analysis. But NRMP is not one of them. It falls squarely within the category of restraints that must be given special consideration to account for their broader societal impact. How this case turns out will therefore depend on whether the benefits of NRMP measure up against the program's apparent per se anti-competitive construct.

The matching program

NRMP was created in 1952 to bring order to the chaotic process under which medical students and residency programs found one another. Because of a recurring surplus of residency positions, hospitals found themselves drawn into a mad dash every year to grab the most attractive medical students. Even the most prestigious institutions got sucked into this frenzy.

Students, too, did not fare well in the ensuing melee. Rather than hold out for their preferred programs, they were swept into accepting positions early on for fear of coming up empty later. They were often pressured into choosing residencies well before they had any clear choice of specialty (sometimes in their second or third year of medical school). What resulted from this haphazard approach was a complete misallocation of student-hospital preferences.

MARTIN MAYO

NRMP was designed to change all this. And apparently it has. By locking in participants to computer-generated matches on a fixed date every year, the program has replaced what was once a harried free-for-all. NRMP is an efficient mechanism that uses an algorithm to optimize hospitals' and students' residency choices. The complaining residents, though, see it all quite differently.

From a stark antitrust perspective, the residents clearly have the upper hand. Agreements among competitors to fix prices, allocate markets or otherwise refuse to compete are per se illegal under the antitrust laws. NRMP—with its fixed allocation of residency positions—therefore appears to be unlawful on its face regardless of its benefits or efficiencies.

But most courts will not apply per se treatment in such a mechanical fashion to a practice involving education or the professions. Nor should they. A flexible approach is warranted to account for the public service attributes that may be rooted in such noncommercial activity. Hence, practices that would otherwise summarily be condemned as per se illegal are routinely and wisely evaluated under a more forgiving standard so that any redeeming virtues can be fully fleshed out.

This is exactly what happened in a price-fixing case brought by the Department of Justice 10 years ago against the Ivy League schools. The government challenged the schools' practice of collectively setting the amount of financial aid they offered to commonly admitted students, a practice with strong parallels to NRMP. After the district court found for the government, the 3d Circuit reversed and remanded, chiding the lower court for failing to evaluate thoroughly the practice's procompetitive and social welfare justifications.

Residents challenging NRMP will therefore have to confront the numerous justifications the defending hospitals will surely proffer, such as efficiency, fairness, maximization of residency choice and perhaps even an increase in the overall quality of health care in this country. Unless the residents can show that these and any other legitimate NRMP attributes could have been achieved through a less restrictive alternative to NRMP, their challenge may come up flat. And it should.

Whatever ultimately happens here, life for the residents is bound to change. Just two weeks ago, the Accreditation Council for Graduate Medical Education, one of the principal defendants in this lawsuit and the organization that accredits the country's training hospitals, announced that it would impose strict limits on the number of hours residents can work. This comes on the heels of proposed federal legislation that would impose similar restrictions on a national level.

Whether the wholesale elimination of NRMP should come next is a thornier issue, and one the court must treat with special sensitivity, lest the ultimate beneficiary of the antitrust laws—the public—end up the real loser. NLJ

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