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February 21, 2017

Mr. Donald J. Palmisano, Jr.
Executive Director / CEO
Medical Association of Georgia
1849 The Exchange, Suite 200
Atlanta, Georgia 30339

Re: Constitutionality and Anti Trust Analysis of HB 71

Dear Mr. Palmisano:

This is in response to your request for a legal opinion whether HB 71 lines 182 through 198 may violate federal and state law. For the reasons cited below, we believe it is likely HB 71 violates federal antitrust laws without any exception and also impinges upon the right to privately contract, a right guaranteed by the Georgia Constitution.

HB 71 (as amended) provides in pertinent part:

> (h) On and after January 1, 2018, a hospital shall make network participation in the health benefit plans insurers contracted by such hospital a credentialing requirement for any health care provider in order to receive credentials for providing care or receiving admission privileges. As a part of the credentialing agreement, a hospital shall receive the power to contract for the network participation of its providers with health benefit plans of such insurers, provided that such health care providers shall be responsible for negotiating all other terms, conditions, and prices with the health benefit plans insurers. Insurers shall conduct all such negotiations in good faith, which obligation shall be enforceable by the Commissioner.
>
> (i) As a part of a network participation agreement between a health benefit plan insurer and a hospital, the plan insurer shall agree to the participation of health care providers credentialed by the hospital, unless withholding of such agreement for a particular health care provider is based upon cause.
>
> (j) Network participation agreements executed by a hospital shall include all appropriate units of the hospital operations.
>
> (k) Hospital and provider obligations under this Code section shall be enforceable by the Department of Community Health.

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<u>HB 71 lines 182 through 198 Violates 15 U.S.C. § 1 *et seq.*</u>

HB 71 violates Federal antitrust laws, because it is an illegal restraint of commerce. 15 U.S.C. § 1 *et seq.* The business of being a physician can involve contracting with insurance companies. Physicians negotiate with insurance companies to agree upon the amount of money the insurance company will pay the physician for each medical procedure or task. For example, if a physician performs gall bladder surgery on a patient, the insurance company and physician can agree on the amount of money the physician will receive from that insurance company as payment for performance of the surgery. Some insurance companies may be willing to pay more or less for the specific surgery depending on the physician's skill and expertise. If an insurance company is not willing to pay the price offered by the physician, the physician can decide not to contract with that insurance company. Insurance companies that think it is good for their business to pay the offered price for such services for that particular physician may decide to accept the price. Deciding to shop around to other insurance companies and physicians could also lead to better deals for each market participant. Further negotiations could also ensue based upon the leverage created by talking to other market participants.

HB 71 is an unfair restraint on commerce, because it forces physicians to negotiate payment rates with insurance companies. The Bill gives hospitals the right to contract with insurance companies on behalf of physicians.[1] Essentially the Bill says that a hospital can contract for the physician to use an insurance plan. The Bill attempts to fix this obvious problem by stating that the physician is then allowed to negotiate prices for their services. In reality this is no fix at all, because once the hospital chooses the insurance plan, the physician no longer has any bargaining power, because they can no longer offer their services to other market participants.

HB 71 also creates an situation where insurance companies and hospitals can form agreements without input from physicians. For example, if an insurance companies wants a hospital to use them as their in network carrier, their best negotiating tool is to offer high payment rates for hospital services. If a hospital agrees to this payment model then physicians are left without any negotiating power. The physician is being cut out of the negotiating process by this statute. This creates an unfair marketplace favoring hospitals and insurance companies at the expense of physicians.

<u>State Action Immunity Does Not Apply to HB 71</u>

State action immunity to federal antitrust laws does not apply to HB 71, because there is no active state supervision. States are given immunity from anticompetitive conduct when they are acting in their sovereign capacity. <u>Parker v. Brown</u>, 317 U.S. 341, 350-351 (1943).

> "But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. *See Parker, supra*, at 351, 63 S. Ct. 307, 87 L. Ed. 315 ("[A] state does not give

[1] "As a part of the credentialing agreement, a hospital shall receive the power to contract for the network participation of its providers with health benefit plans of such insurers..." HB 71, lines 185-187.

> immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. *See Hoover*, *supra*, at 567-568, 104 S. Ct. 1989, 80 L. Ed. 2d 590. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity."

N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101,1110 – 1111 (2015). In order for a non-sovereign, such as an insurance company and hospital to receive antitrust immunity the policy must be "clearly articulated and affirmatively expressed as state policy" and "the policy must be 'actively supervised" by the State itself. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980) (citations omitted).

Insurance companies and hospitals are non-sovereign actors. HB 71 confers upon the insurance companies and hospitals the ability to violate federal anti-trust laws by taking away a physician's ability to negotiate and determine their contractual/business partners. Instead of allowing a physician to contract separately with hospitals and insurance companies, HB 71 could allow hospitals and insurers to work together to restrain a physician's ability to choose their business partners and negotiate higher reimbursement rates. This is a form of price fixing and anticompetitive conduct, which is prohibited by antitrust laws.

HB 71 gives the insurance commissioner the power to enforce an insurers obligation to negotiate with hospitals and physicians in "good faith" at the discretion of the commissioner.[2] The bill states that this section of the Bill is "enforceable" by the commissioner, but it does not say that it *must* be enforced by the commissioner. Even if the insurance commissioner chooses to enforce this section of the Bill, there are no prescribed mechanisms or guidelines for enforcement.

In Midcal a California price maintenance program for wine dealers was challenged under antitrust laws. Under the statute, private market participants, including producers and wholesalers were in charge of setting wholesale and retail prices. The Court found that this was a violation of the Sherman Antitrust act, because it illegally restrains trade. The Court noted that such similar statutes have been consistently deemed illegal restraints of trade, because they are "designed to maintain prices... and to prevent competition among those who trade in [competing goods]." Id. at 102 (internal quotations omitted)(citations omitted). The Court also reasoned that the "wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." Id. at 103.

The Midcal Court then set out to determine whether the state's involvement in the price maintenance program triggered state action immunity from anti-trust laws. The Court found that state action immunity did not apply because the policy was not actively supervised by the state. The "State simply authorizes price setting and enforces the prices established by private parties.

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[2] "Insurers shall conduct all such negotiations in good faith, which obligation shall be enforceable by the Commissioner." HB 71, lines 188-190.

The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts." Id. at 105-106.[3]

HB 71 violates anti-trust laws just as the California Statute in Midcal violated antitrust laws. Both laws confer power to non-sovereign private market participants. Just as wine producers were given the power to set prices for other market participants in Midcal, HB 71 gives insurance companies and hospitals the ability to contract for physicians. HB 71 prevents competition between physicians and insurance companies, because a physician must negotiate with a previously chosen company if it wants to perform services at a particular hospital. This is similar to Midcal in that wine wholesalers were able to set the market for other merchants in the chain thereby eliminating horizontal competition between wholesalers and retailers.

State action immunity to antitrust laws does not apply to HB 71 just as it did not apply in the Midcal case, because contracts between insurance companies, hospitals, and physicians are not actively supervised by the state. HB 71 simply states that the insurance commissioner can decide whether or not to enforce an insurers obligation to negotiate in good faith. This is a vague duty with no guidance and without a mandate. There is truly no state enforcement mechanism, because the insurance commissioner does not have to enforce any part of this section of the bill. Regardless, the commissioners only guidance is to ensure "good faith" negotiations, and says nothing about the reasonableness of the prices and contracts established under the statute.

HB 71 is a violation of federal antitrust laws, because it restrains trade, and allows for anticompetitive conduct and price fixing. State action immunity from antitrust laws does not apply in this matter, because insurance companies and hospitals are non-sovereign actors without any active state supervision as defined by the U.S. Supreme Court.

HB 71 impinges upon the right to contract, a right guaranteed by the Georgia Constitution

Again, HB 71, by its terms provides that: "a hospital shall receive the power to contract for the network participation of its providers with health benefit plans of such insurers, provided that such health care providers shall be responsible for negotiating all other terms, conditions, and prices with the health benefit plans insurers. Insurers shall conduct all such negotiations in good faith, which obligation shall be enforceable by the Commissioner." (Emphasis added).

The quoted language has the effect of limiting the capability of a provider to become credentialed and therefore obtain privileges at a hospital of their choice. It also adds an additional, non-quality related metric, to the well-established credentialing process which focuses on competency and quality of care rather than "economic credentialing."[4]

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[3] We should note that this does not mean that the state was not involved, but only that the state's involvement was related to enforcement of the statute via fines and licensure.

[4] Medicare Conditions of Participation (COP) seem to indicate the criteria for selection of medical staff are "individual character, competence, training, experience, and judgment." 42 CFR § 482.12(a)(6). The COP also indicates the governing body of a hospital must "[e]nsure that under no circumstances is the accordance of staff membership or professional privileges in the hospital dependent solely upon certification, fellowship, or membership in a specialty body or society." 42 CFR § 482.12(a)(7).

As detailed in the cited section, while hospitals are given the power to contract for the network participation of its providers with health benefit plans with insurers, the individual health care providers must negotiate "all other terms, conditions and prices" with the health benefit plans insurers. (Emphasis added). This forced negotiation limits the health care providers' ability to contract with a health benefit plan insurer of their choosing, and even forces the health care provider to negotiate with a party where there is no legal requirement to otherwise do so.

In addition, and perhaps recognizing that the Insurance Commissioner does not have regulatory authority over health care providers, the proposed legislation requires insurers to conduct such negotiations with health care providers "in good faith" while making the provider obligations enforceable by the Department of Community Health. This does not take into account the fact that the provider does not have any legal "obligations" under this code section.

The proposed legislation therefore restricts the freedom of health care providers to contract, a right which is guaranteed by the Due Process clause of the Georgia Constitution.[5] The proposed legislation goes beyond "price fixing" and leaves it to a private industry (insurers who happen to have a financial interest) to set the prices with health care providers. Importantly, there are absolutely no guidelines as to how the Insurance Commissioner is to judge whether the insurer conducted the negotiations in "good faith."

Long standing principles of Constitutional law and Georgia case law indicate that "[b]efore the General Assembly can authorize price fixing without violating the due process clause of our Constitution, among other requirements, it must be done in a business or where property involved is "affected with a public interest." Harris v. Duncan, 208 Ga. 561, 563 (1951).

The phrase "affected with a public interest" is defined as:

> Considered affirmatively, 'it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance'."

Id. at 564.

The issue in the Harris case was the regulation fixing the price of milk. In considering whether this industry was "affected with a public interest," the Court explained:

> For an industry or any particular business to become "affected with a public interest," its business or its property must be so applied to the public as to

[5] "No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. Art. I, § I, Para. I.

> authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public.

Id. at 564.

In addition, the Harris Court adopted the following reasoning as to the right to contract:

> "The right to contract is a property right which is protected by the due-process clauses of our State and Federal constitutions, which can not be abridged by mere legislative act . . . To allow abridgment . . by taking from them the right to agree upon the price, would be to put legislation, whether enacted in exercise of claimed general or police power of the legislature, above the constitution. In this view so much of the act in question as attempts to fix the price . . is void as violative of the due-process clauses of the State and Federal constitutions."

Id. at 563 (internal citations omitted).

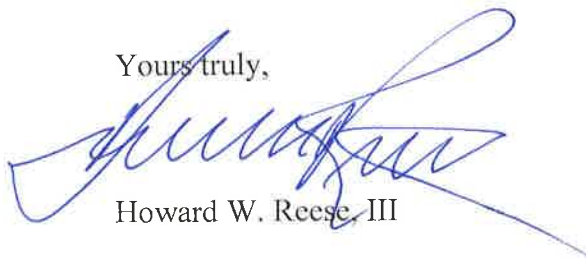
In finding a statute unconstitutional as violating due process, the Northern District of Georgia in O'Brien v. Union Oil Co., 699 F. Supp. 1562, 1569 (N.D. Ga. 1988), reasoned: "[t]he court believes, therefore, that the Georgia courts would look with strong disfavor upon legislation forcing a party to deal with another with whom he did not bargain and in whom he had not entrusted the rights and duties under the contract in question."

Here, while it is accepted that the provision of health care and the payment therefor has a wide audience, it still cannot be said that the very industry itself has been "granted to the public." This is evidenced by the inclusion of private health benefit plans into the legislation. Legislation forcing providers to negotiate with private insurers therefore impinges upon the right to freely contract.

Therefore, for the reasons cited above, we believe it is likely HB 71 violates federal antitrust laws without any exception and also impinges upon the right to privately contract, a right guaranteed by the Georgia Constitution.

With best regards,

Yours truly,



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