Children, Families, Health, and Human Services Interim Committee

60th Montana Legislature

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FROM: Lisa Mecklenberg Jackson, Staff Attorney

RE: Review of Montana court cases involving challenges between hospitals and physicians (with regard to SJR 15, 2007)

DATE: September 24, 2007

INTRODUCTION

When examining Montana court cases relating to hospitals and physicians or even physician-owned facilities, it is important to note that many actions are brought under the auspices of unfair trade practices which prevent acts such as price fixing, preventing competition in the distribution or sale of merchandise, or creating a monopoly. Accordingly, these actions can be brought in either state court (via the Unfair Trade Practices Act, MCA 30-14-201 et. seq.) or federal court in what are called antitrust actions (via the Sherman Act 15 U.S.C. sections 1 and 2). The Supreme Court of Montana has held that the antimonopoly provisions of Montana's Unfair Trade Practices Act and the antimonopoly section of the Sherman Act are very similar and due weight will be given by Montana courts in interpreting the state statute to federal courts' interpretation of the Sherman Act. *Smith v. Video Lottery Consultants* (1993), 260 Mont. 54, 58, 858 P.2d 11, 13. A party bringing a claim under section 1 of the Sherman Act must prove three elements: 1) an agreement or conspiracy among two or more persons or distinct business entities; 2) by which the person or entities intend to harm or retrain competition; and 3) which actually injures competition. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988). Although MCA 30-14-205 is modeled after section 1 of the Sherman Act, it differs in one critical respect. Unlike the Sherman Act, which requires two or more persons to be involved in unlawful trade restraint, one person acting alone may violate the restraint of trade provision of the Montana Unfair Trade Practices Act. Accordingly, you will note in looking at these cases involving hospitals and physicians, they are filed in, or appealed to, a variety of courts, including the state district court, the state supreme court, the federal district court, and the 9th Circuit of Appeals.

CASES DECIDED

Cole v. St. James Healthcare, Cause No. DV-07-44, (2nd Judicial District, 2007)
The court ruled that St. James Healthcare must grant professional privileges to radiologist Dr. Jesse Cole rather than considering him a consultant whose privileges are limited. Dr. Cole had

brought suit against St. James claiming they had violated a contract and reduced his full staff privileges to consulting privileges. The court further stated that St. James must not give the National Practitioner Data Bank any adverse reports tied to Cole's reduction in privileges and that if St. James intended further action against Cole, a peer investigation by the hospital's doctors must take place. An investigation that a St. James lawyer conducted was invalid, the judge ruled.

Bizzle v. N. Mont. Healthcare, Cause No. DV 95-149, (12th Judicial Dist., 1999)
Dr. Paul G. Bizzle, a board-certified orthopedic surgeon, brought this action against Northern Montana Hospital and Northern Montana Healthcare, Inc. as the parent corporation, under the Montana Unfair Trade Practices Act (MCA 30-14-201 et. seq.). In 1990, Bizzle moved to Havre where he established his practice and had staff privileges at Northern Montana Hospital. At that time, another orthopedic surgeon was practicing at the hospital; that person retired in 1992 leaving Bizzle as the sole orthopedic surgeon practicing in Havre. Shortly thereafter, Bizzle publicly announced his decision to no longer treat Medicare patients. The hospital subsequently recruited an orthopedic surgeon, Dr. Joel E. Cleary, to provide orthopedic services to all members of the community, and he began practicing under contract with the hospital in 1993. Dr. Cleary and Bizzle were competing orthopedic surgeons in Havre until 1995 when plaintiff relocated to Oklahoma. Bizzle filed suit, alleging the defendants violated Montana's Unfair Trade Practices Act. In order for Bizzle to prevail in his unfair trade practices action, the court determined that he must show harm to the economy rather than economic injury to himself. To do so, Bizzle must submit evidence of a restraint on competition in the relevant market, and further must show evidence that the restraint is substantially adverse. **To show a substantial effect on competition, the plaintiff must show that there was either: 1) a rise in the price of medical services above a competitive level; 2) a decrease in the quantity of doctors in the market; or 3) a decrease in the quality of medical service provided.** Because Bizzle failed to provide evidence of any of the above, beyond more than just a mere rise in the price of medical services, he did not meet the threshold necessary to establish a restraint of trade and the court entered judgment in favor of the defendants.

Blue Cross and Blue Shield of Montana, Inc. v. Agather, BDV 97-181, (1st Judicial Dist., 1999)
Pending before the court are a motion for protective order filed by Blue Cross (relating to the deposition of five of its officers) and a motion to compel discovery filed by Agather. One of Agather's claims is that Blue Cross has violated statutes relating to unlawful restraint of trade, monopoly, and unfair competition. **Discovery materials already furnished allege that Blue Cross wanted to control large group insurance in the state of Montana, and they effectively did this by subsidizing the premiums charged large groups by charging higher premiums to individuals and small groups.** Discovery materials furnished to Blue Cross by Agather establish this fact. Blue Cross wanted to control large groups because then they could control the discounts provided by doctors and hospitals. Based on this, the court decided there may be "at least some minuscule factual support" for Agather's anti-trust contentions and granted his motion to compel, dismissing Blue Cross' motion for protective order.

United States. v. GE , CV 96-121-M-CCL, (U.S. Dist. Court Mont., 1997)

The government filed an antitrust complaint alleging that GE violated the Sherman Act by using illegal, restrictive licensing agreements to prevent hospitals from competing to service high-tech medical equipment. The complaint for equitable relief contains two counts--one alleging violation of section 1 (restraint of trade) of the Sherman Act and the other alleging a violation of section 2 (conspiracy to monopolize) of the Sherman Act, 15 U.S.C. 1 and 2.
The government claims that GE has entered into anticompetitive agreements with more than 500 hospitals that are among GE's most significant actual or potential competitors in the servicing of medical imaging equipment. The government alleges that these agreements are contained in licenses which authorize the hospitals to use advanced GE software to service their own GE medical imaging equipment. In exchange for the license, it is alleged that GE has required each hospital to agree not to compete with GE in servicing any other facilities' medical imaging equipment. The complaint states that the hospitals, including St. Patrick's Hospital in Missoula and Deaconess Hospital in Billings, have in-house service departments that would like to service other facilities' imaging equipment, but they cannot do so due to their licensing agreement with GE. **With regard to count 1 (restraint of trade) the government argues that the agreements GE extracted from its licensees not to service other facilities' medical equipment are unrelated to any of GE's legitimate interests in licensing its software and manuals, and that GE's agreements with the hospitals have caused actual detrimental effects to competition by causing healthcare providers to pay higher prices, purchase less service and have fewer options in various service and equipment markets, thereby making their actions a conspiracy in restraint of trade. The court agreed.** With regard to count II (conspiracy to monopolize) the government argues that to show a conspiracy to monopolize it need only show that the hospitals agreed to cooperate with GE with some awareness of the anti-competitive effect. The court disagreed, stating that absent direct or circumstantial evidence of a meeting of the minds and a conscious commitment to a common scheme, the section 2 conspiracy claim fails.

Montana Associated Physicians, Inc. v. Billing Physician Hospital Alliance, Inc., 123 F.T.C. 62 (1997) (consent order)
The complaint charged that a physician association (MAPI) blocked the entry of an HMO into Billings, obstructed a preferred provider organization that was seeking to enter, recommended physician fee increases, and later acted through a physician-hospital organization (BPHA) to maintain fee levels. **The order prohibits MAPI and BPHA from agreeing, for a 20 year period, to: 1) boycott or refuse to deal with third-party payers; 2) determining the terms upon which physicians deal with such payers; and 3) fixing the fees charged for any physician services.** MAPI also is prohibited from advising physicians to raise, maintain, or adjust the fees charged for their medical services, or creating or encouraging adherence to any fee schedule. The order does not prevent these associations from entering into legitimate joint ventures that are non-exclusive and involve the sharing of substantial financial risk.

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir., 1988)
Following his termination due to an exclusive staff agreement between anesthesiologists and St. Peter's Hospital, Oltz, a nurse anesthetist, brought this antitrust action against the anesthesiologists and the hospital. In 1974, Oltz and his wife, also a nurse anesthetist were

living in Bozeman. At the request of St. Peter's, Oltz began administering anesthesia at St. Peter's in Helena pursuant to a written billing agreement. Oltz was an independent contractor and not a hospital employee and accordingly had independent billing status, meaning he could charge less for his services than anesthesiologists employed by the hospital. In response to complaints from their in-house anesthesiologists, the hospital board decided to offer an exclusive contract for anesthesia service, for which they advertised nationally. The contract was ultimately rewarded to an association formed by three of the four anesthesiologists already in Helena. Oltz' exclusive contract was terminated. After Oltz' departure from St. Peter's each of the anesthesiologists in Helena experienced increased annual earnings by 40-50%. Oltz sued St. Peter's and the four anesthesiologists under section 1 of the Sherman Act. The four doctors settled and their case was dismissed. St. Peter's was found liable on a theory of conspiracy to boycott and exclude competition. The jury then awarded Oltz damages for lost income and loss of future interests. Both sides appealed to the 9th Circuit. **The 9th Circuit found St. Peter's liable under the Sherman Act (the exclusive anesthesia contract and termination of Oltz had a detrimental effect on competition and the ability to control prices for the consumer), the hospital acted with intent to restrain competition (beyond a mere staffing arrangement), and engaged in a conspiracy (board minutes show the trustees knew of and submitted to pressure from the anesthesiologists to terminate Oltz).** The 9th Circuit court affirmed the district court's denial of the hospital's motion for a new trial on the issue of liability and affirmed judgment for a new trial on damages after finding the damages awarded to Oltz were excessive (the absence of evidence on Mrs. Oltz' post-1980 income may have created a false impression among jurors concerning the actual impact and result of the termination on Mr. Oltz).

Montana Board of Optometrists, 106 F.T.C. 80 (1985) (consent order)
The complaint charged that a state optometric board engaged in unlawful **concerted action to restrain competition among optometrists** by restricting optometrists from truthfully advertising prices, terms of credit, down payments, periodic payments, professional superiority, or from using the expression “Contact Lens Clinic” or “Vision Center.” State law authorized the board to regulate only the use of untruthful or ambiguous advertising, and prohibited only the use in advertisements of the expression “eye specialist” or “specialist in eye” in connection with the name of an optometrist. **The order prohibits the board from restricting truthful advertising.** Under the order, the board may adopt and enforce reasonable rules to implement state law.

Western Mont. Clinic v. Jacobson, 169 Mont. 44, 544 P2d 807 (1976)
An appeal from summary judgment for Dr. Jacobson entered on the ground that a restrictive covenant against competition violated Montana law. **The sole issue on appeal is whether the restrictive covenant in the Articles of Incorporation of the Western Montana Clinic in enforceable.** Dr. Jacobson is a licensed orthopedic surgeon who became an employee of Western Montana Clinic in January 1968. On August 1, 1973, Jacobson withdrew from the Clinic for alleged professional reasons and established a private practice in Missoula limited to orthopedic surgery. The Clinic then demanded that Jacobson pay 30% of the gross proceeds from his medical practice for three years following August 1, 1973 because of a provision in the Clinic's Articles of Association. Jacobson refused, calling the provision an illegal contract in

restraint of trade under R.C.M. 13-808 and the Clinic filed this action. Under R.C.M. 13-808, any contract which restrains someone from exercising a lawful trade or profession is void. Exception: One who sells the good will of a business and engages in a similar business within the local area. The relevant language in the Articles of Association (Article XX) states "Each member of this Association...for the protection of the good will of the Association... agrees that in the event that any of them withdraws from this Association...he will not engage in, or carry on the practice of medicine or surgery within the county of Missoula for a period of three years from the date of such separation." The next Article (Article XXI) requires the member to renounce all claims to any division of assets of the Association upon his withdrawal. Jacobson argues that he could not sell any good will to the Association because as a result of Article XXI, all of the assets of the Clinic, including good will were already owned by the Association. There can be no "legitimate" sale of good will, Jacobson says, because technically Jacobson had no good will to sell and was paid nothing for it. **A legitimate sale of good will is one of the elements needed to make the contract not to compete enforceable**, he said. The court agreed, finding in favor of Jacobson.

CASES PENDING

St. James Healthcare v. Cole, DV-06-264, (2nd Judicial Dist., 2007). Currently on appeal to the Montana Supreme Court (DA-07-0084)

Dr. Cole provides radiology and medical services at St. James Healthcare in Butte and has held physician privileges with St. James Hospital in Butte since 1996. For a number of years, Dr. Cole had an exclusive contract with the hospital to provide radiology services at St. James Healthcare; this contract was terminated in January of 2005 and St. James Healthcare began negotiating with Boston University and specifically, Anna Chacko, M.D. for radiology services at the hospital. In October of 2006, Dr. Chacko visited St. James as part of her negotiations with St. James Healthcare. Upon her return to Boston, Dr. Chacko received an e-mail message from Dr. Cole, whom she had not met, to call her. She did. During the conversation, Dr. Cole got very angry and allegedly told Dr. Chacko that "bad things could happen to you." (Dr. Cole denies he said this). Dr. Chacko contacted St. James and told them she feared for her safety. During this same time period, Dr. Cole contacted other doctors at Boston University. **Subsequently, the St. James Board of Trustees filed suit and requested a restraining order, the subject of these proceedings, in part to stop Dr. Cole's threatening and harassing conduct towards Dr. Chacko and various individuals at Boston University.** The complaint also contains further allegations of harassment and intimidation of other doctors by Dr. Cole. One of those doctors was Daniel Alzheimer, a radiologist currently living in Sheridan, Wyoming. In the 1990s, Alzheimer lived and practiced radiology in Butte. After he left Butte, he continued to provide radiology for St. James Healthcare on an occasional basis, necessitating his presence in Butte on some weekends. Alzheimer testified that he received several phone calls from Dr. Cole, including one in which Dr. Cole told Alzheimer's young son his dad was going to jail and that he had been told by a St. James staff member that Dr. Cole said he would be at the hospital to greet him. Dr. Cole also placed false ads in the Sheridan newspaper causing disruption to Alzheimer's Sheridan radiology practice. Further, Dr. Cole admitted that at times he brought firearms to St. James Healthcare, leaving them in his car. Based on these facts, **the 2nd Judicial District Court**

held that the speech Dr. Cole engaged in, which was harassing, intimidating, and threatening was not protected by the Constitution. Further, St. James has a right to request relief and protection for those persons who live and work at their facility and a permanent restraining order against Dr. Cole was in order as there is a danger of immediate and irreparable harm to St. James and its staff. On appeal to the Montana Supreme Court, Dr. Cole argues that there is no evidence supporting the conduct from which is he enjoined, the hospital had no standing to obtain a protective order for other persons, and the injunction is an unconstitutional prior restraint of free speech. IMPORTANT TO NOTE: An Amicus Brief was filed with the Supreme Court on April 12, 2007. Each of the physician amici are members of the medical staff at St. James Healthcare who are concerned that the district court's injunction, and the precedent it sets, affects physicians and their ability to speak out on matters concerning the availability and quality of healthcare services for patients, as well as on matters that may directly or indirectly affect their business concerns in their private medical practices.

Capital Radiology, PLLC v. St. Peter's Hospital, et al., (U.S. Dist. Court Mont. 2007). (Currently pending before Judge Donald Molloy, Helena). Amended complaint filed June 21, 2007 Beginning in 1994, Daniel Alzheimer, M.D., Dennis Palmer, M.D., and Randy Sibbitt, M.D. practiced radiology as members of Montana Radiology, PLLC. Montana Radiology provided services to St. Peter's Hospital on a fee for service basis and had no contract with St. Peter's. The plaintiff alleges that between 1994 and 2003 there were numerous patient and physician complaints regarding the radiology services provided by Sibbitt and Palmer at St. Peter's and that in the summer of 2003, Alzheimer rejected St. Peter's solicitations to leave Montana Radiology and to be employed, directly or indirectly, by St. Peter's. In November 2003 Alzheimer disassociated from Montana Radiology. Thereafter, Alzheimer established Capital Radiology. Sibbitt and Palmer continued to operate Montana Radiology in competition with Capital Radiology until February 2004 when they dissolved Montana Radiology and formed Radiology Specialists. Until June 2004, Capital Radiology and Radiology Specialists competed in the Helena radiology market. Dr. Alzheimer alleges that during that timeframe, St. Peter's unfairly distributed the lion's share of its radiology referrals to Radiology Specialists despite request from employees and staff physicians to designate Capital Radiology for specific radiology referrals. In June 2004, Alzheimer contends he was forced to withdraw from the Helena radiology services market and was granted a leave of absence from his medical staff position at St. Peter's.
In short, **Alzheimer alleges that through their actions the defendants injured competition in the market by denying patients through their treating physicians the opportunity to select among competing providers of radiology services, reducing the quality and quantity of radiology services, and empowering Radiology Specialists, utilizing the monopoly power of St. Peter's to control price, quantity, quality, and consumer choice in the market.**
Capital Radiology alleges: 1. Defendants entered into an unlawful combination and conspiracy in unreasonable restraint of interstate trade in violation of section 1 of the Sherman Act, 15 U.S.C. 1; and 2. Defendants engaged in an unreasonable restraint of trade in violation of MCA 30-14-205. Capital Radiology is asking for an injunction against the performance or enforcement of the exclusive contract between St. Peter's and Radiology Specialists, monetary damages, costs, and punitive damages.

Laurence Ayres, M.D. v. Missoula Anesthesiology, P.C., (U.S. Dist. Court Mont., 2007). Currently pending before Judge Molloy, Missoula). Complaint filed March 16, 2007
Dr. Ayres is a board certified anesthesiologist from Missoula. He filed suit on March 16, 2007 against Missoula Anesthesiology, P.C., a group of 26 actively practicing anesthesiologists in the Missoula area (Dr. Ayres is the only anesthesiologist practicing in Missoula that does not belong to the group) and several of its shareholders. Ayres brought the action in federal district court based on the defendants receiving a large portion of their revenue from the federal government through Medicare, Medicaid, etc., and a large portion of patients receiving healthcare coverage through out-of-state companies. Accordingly, this action is brought pursuant to sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). There are no anesthesiologists, other than members of Missoula Anesthesiology, who have staff privileges at the two largest of Missoula's three surgery centers, Big Sky Surgery Center and Missoula Bone and Joint Surgery Center and at the third, Providence Surgery Center, Dr. Ayres is the only other anesthesiologist with privileges. Dr. Ayres is also the only actively practicing anesthesiologist, other than those in Missoula Anesthesiology with regular staff privileges at Missoula's two hospitals: Community Medical Center and St. Patrick Hospital. **Dr. Ayres alleges that Missoula Anesthesiology manipulated the scheduling of anesthesiology services performed at Missoula's hospitals and surgery centers such that Dr. Ayres, or any anesthesiologist who is not a member of Missoula Anesthesiology, cannot reasonably maintain a viable anesthesiology practice in the Missoula area market; refused to exchange coverage with Dr. Ayres, as prescribed under standards adopted in the anesthesiology profession, with respect to daily coverage and on-call emergency coverage for surgeries; and precipitated the effective cancellation of a contract between Dr. Ayres and Community Medical Center for his provision of obstetrical anesthesiology services** (because he has no assistance with coverage, he cannot perform the contract), **essentially affecting a monopoly in the Missoula area.** Ayres also contends that Missoula Anesthesiology forces all patient consumers who are enrolled in the Blue Cross Blue Shield plans or programs to pay "balance" bills or a premium over and above market-based rates on all procedures that would otherwise be paid for by BCBS. Ayres is looking for an injunction (voiding the exclusive agreements by Missoula Anesthesiology with the Big Sky and Missoula Bone and Joint surgery centers, prohibiting Missoula Anesthesiology from entering into any exclusive contracts with any general in-patient acute-care hospital or free-standing surgery center in the greater Missoula area, prohibiting Missoula Anesthesiology from controlling scheduling for anesthesiologists at St. Patrick and Community Hospitals, and prohibiting Missoula Anesthesiology from refusing to deal with Dr. Ayres or any other anesthesiologist unaffiliated with Missoula Anesthesiology), damages, and costs.

CONCLUSION

While several significant court cases are pending, the decisions of the various courts seem to appear divided as to the ultimate winners in litigation, the hospital, or the physician. However, two things do seem clear: 1) hospital staffing decisions and work agreements which might be viewed as anticompetitive, monopolistic, and in violation of free trade will be carefully scrutinized by the courts at every level; and 2) litigation in this area has (in the words of The Carpenters) "only just begun."

* Several cases with an almost identical fact pattern were decided in favor of the hospital. See *Williams v. Hobbs*, 460 N.E.2d 287 (Ohio Ct. App. 1983) (approving termination of radiology privileges in compliance with exclusive contract) and *Lyons v. St. Vincent Health Ctr*., 731 A.2d 206 (Pa. Commonw. Ct. 1999 (upholding refusal to renew radiologist's clinical privileges due to exclusive contract with radiology group).

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