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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SAN FRANCISCO REGIONAL OFFICE

COMMISSION AUTHORIZED

May 21, 1987

The Honorable Chuck Hardwick
Speaker of the Assembly
of the State of New Jersey
State House Annex, CN098
Trenton, New Jersey 08625

Attention: John Kohler
Assembly Republican Staff

Re: Assembly Bill 2647

Dear Mr. Speaker:

We are pleased to provide these comments in response to your request for our views on Assembly Bill 2647 ("A-2647").¹ This bill would prevent a physician from having a financial interest in any entity that provides physical therapy services, and from referring patients for physical therapy to an entity in which the physician's family has any financial interest. We believe that this bill is likely to injure consumers by reducing competition among physical therapy providers, thereby decreasing the choices available to consumers. Consequently, we respectfully recommend that the New Jersey legislature not approve A-2647. Should you nonetheless conclude that some corrective measures are necessary, we believe that a simple disclosure of the physician's financial interests would be a less restrictive alternative to the proposed legislation.

¹ These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics, and the San Francisco Regional Office of the Federal Trade Commission, and do not necessarily represent the views of the Commission itself. The Commission has, however, voted to authorize their submission. The San Francisco Regional Office has participated in the preparation of these comments because of its experience in this subject area. See Letter to Lin Ng, Deputy Attorney General, State of Nevada, regarding Nevada Board of Physical Therapy (October 23, 1986).

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission has investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, lawyers, physicians, non-physician health care providers, and others. The goal of the Commission has been to identify and recommend the removal of those restrictions on practice that impede competition or increase costs without providing adequate countervailing benefits to consumers. We believe that A-2647, as proposed, may result in these adverse effects.

Potential Harm to Competition and Limitation of Consumer Choice

A-2647 would restrict competition among physicians and physical therapists in several ways. First, by forbidding physicians from including physical therapy in their practice unless they provide the treatment personally, it would prevent physicians from employing physical therapists. Second, by prohibiting a physician from having "any financial interest" in any entity that provides physical therapy services, the bill would prevent a physician and a physical therapist from forming a joint practice through which they may compete with other types of physical therapy practices, and would prevent physical therapists who wish to affiliate with physicians from doing so.² Finally, the bill would prevent physicians from referring patients to physical therapy services in which a member of the physician's family has a financial interest. This limitation prevents referral to a therapist that the physician and patient may find best suited to the patient's needs. In essence, A-2647 would limit competition between independently practicing physical therapists and other health care provider arrangements merely because these arrangements are owned, at least in part, by physicians or their families.

The primary adverse effect of A-2647 is that the legislation would deny consumers the benefits of the full range of service, price, and quality options that a competitive market would offer. A-2647 may hinder the development of more efficient practices

² A physician would also be prohibited from having any ownership interest in a sports medicine clinic, occupational therapy clinic, or other specialty clinic at which physical therapy services were provided in conjunction with medical services. The prohibitions contained in the proposed legislation are, in fact, so broad that they appear to forbid physicians from even owning publicly-traded securities in health care corporations that provide physical therapy services.

that reduce costs through economies of scale or scope. For example, an orthopedist and a therapist would be unable to open a joint practice that could reduce the administrative costs associated with consultation. Providers would also be limited in offering, and consumers prevented from purchasing, allied services at a single location. This form of allied practice might provide greater convenience and lower costs to consumers who would otherwise have to go to different locations to obtain these services. For example, a patient may wish to obtain care at a clinic where both diagnosis and therapy are offered (e.g., a sports medicine or occupational health clinic). Similarly, a patient may wish to obtain physical therapy at a facility owned by, and associated with, his physician so that the therapy provided will be closely coordinated with the prescribed treatment plan. If A-2647 is enacted, however, consumers would be unable to select either of these options.

A-2647 could also limit a physician's ability to oversee the care provided to patients. A physician who employs a physical therapist in his practice is able to monitor the prescribed treatment directly. The physician is also readily available for consultation with either the patient or the therapist. These benefits could be lost if physicians and physical therapists were prevented from entering into employment relationships. Moreover, a physician who invests in a physical therapy service, like any long-term investor, will have a direct economic interest in ensuring that the practice provides quality services.

Restrictions on financial arrangements among providers of health care may have adverse effects on consumers. The Commission has taken legal action against private restrictions on such arrangements.³ One such case involved various ethical provisions enforced by the American Medical Association. The Commission found that the AMA's restrictions on physician employment relationships and salaried practice inhibited

³ The Commission staff has also, on several occasions, urged state regulatory boards to avoid enactment or interpretation of regulations that prevent providers from adopting more efficient forms of practice. See, e.g., Letter to Lin Ng, Deputy Attorney General, State of Nevada (October 23, 1986) (opposing a regulation proposed by the Nevada Board of Physical Therapy that would prohibit physical therapists from accepting employment with physicians); and Letter to H. Fred Varn, Executive Director, Florida Board of Dentistry (November 6, 1985) (opposing an interpretation of Florida law that would prohibit dentists from referring patients to other dental practices in which they had an interest).

development of innovative forms of health care delivery that could be cost-efficient, and hence beneficial to consumers.⁴ In addition, the Commission found that the AMA's restrictions on joint business arrangements between physicians and non-physicians inevitably had an adverse effect on competition because they prevented physicians from adopting more efficient business formats.⁵

Less Restrictive Alternatives

The apparent purpose of A-2647 is to ensure that medical care is based on the needs of patients rather than on the financial interests of the practitioner. If a physician has a financial relationship with a physical therapist, then arguably the physician has an incentive to order treatment even if the treatment is not appropriate. In those instances in which patients are unaware that a physician's referral could be motivated by financial considerations, they arguably may be misled about the necessity and cost of the recommended treatment. We believe, however, that these concerns can be alleviated without the prohibition against financial relationships.

The possibility that a physician may order unnecessary treatment is a problem associated with many aspects of medical service delivery, not just physical therapy. Whenever a physician prescribes x-rays, injections, surgical procedures, or other forms of treatment (including follow-up visits) to be provided in the doctor's office, financial considerations could, in theory, affect the recommendation. States, however, generally do not ban doctors from ordering those other services.

There are less restrictive means of preventing abuse or deception than prohibiting physicians from having any economic interest in entities providing physical therapy services. For example, an ownership disclosure requirement could be adopted. Physicians could be required to provide a written disclosure or post a notice informing patients of their financial interest in

⁴ American Medical Ass'n, 94 F.T.C. 701, 1016-18, aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

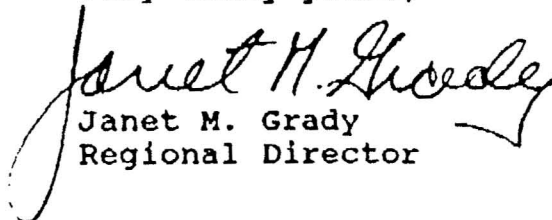
⁵ American Medical Ass'n, supra, 94 F.T.C. at 1018.

entities to which they refer patients.⁶ Disclosure could provide the patient with information that may aid in the decision whether to use the recommended provider, although care should be taken to avoid disclosure requirements that impose unnecessary costs on providers.

Conclusion

In sum, we believe that A-2647 may unnecessarily inhibit beneficial competition and limit consumer choice. It seems broader than necessary to protect consumers from physicians' potential conflicts of interest. Consumers should not be deprived unnecessarily of the benefits of competition, including the ability to choose the provider and practice arrangements most suited to their needs. For these reasons, the staff of the Federal Trade Commission recommends against enactment of A-2647 in its current form.

Very truly yours,


Janet M. Grady
Regional Director

⁶ Similar disclosure requirements already exist in other states. See, e.g., California Business & Professions Code §654.2, which requires that physicians disclose in writing to patients any financial interest they have in facilities to which patients are referred, and inform patients that they do not have to use the provider the physician has selected.