ANTITRUST from page 1

Specialty Societies (BOS) Fall Meeting, Mr. Canterman was one of a panel of attorneys who attempted to clarify how antitrust legislation applies to healthcare providers.

The purpose of antitrust legislation, noted Mr. Canterman, is to prevent private business practices—such as price fixing, boycotts, or monopolization—that unreasonably restrain competition. “Competition benefits consumers,” he said. “When consumers have a choice and can pick among competitors, they have the best opportunity to get lower prices, better quality, and increased choice, selection, convenience, and innovation.”

But who are the consumers when it comes to health care? Certainly, patients are the ultimate consumers, but if the patient has insurance, and the insurance company is paying the bill, then the insurer is also a consumer. And there’s the rub.

“If there’s price fixing among competitors [physicians], those higher prices are going to be passed on [to the ultimate consumer] in terms of higher premiums to employers, and higher copayments and deductibles to patients,” said Mr. Canterman.

On the other hand, “Insurance companies have aggressive contracting practices and demand that physicians accept lower rates of compensation,” noted Fred C. Redfern, MD, BOC secretary, who moderated the session. “But those lower payments for physicians almost never translate into lower premiums, more affordable health care, or increased access to insurance for patients.”

Antitrust 101
As Mark J. Bott, JD, an attorney with Akin Gump Strauss Hauer & Feld LLP, pointed out, antitrust enforcement is “complex, a mix of policy, years of judicial precedent in the relation of law and commercial behavior, and understanding of the particular facts.”

Although both federal and state governments have enacted parallel laws governing antitrust and unfair trade practices, the two primary acts are the Sherman Act, which prohibits “contracts, combinations, and conspiracies” that unreasonably restrain trade, and the Federal Trade Commission Act, which allows the FTC to prohibit “unfair methods of competition.” (See sidebar, “Red flag conduct under antitrust legislation.”)

“Antitrust laws infer agreements from behavior,” said Mr. Bott. “As you approach collegial conversations with colleagues on commercially sensitive topics, a later interpretation of those facts may conclude that you reached an agreement, even though no one said, ‘Do we agree?’”

Mr. Bott acknowledged that physicians may be getting “mixed messages” as antitrust regulators attempt to provide guidance that would enable providers to work together on a commercial basis. Whether the guidance has been sufficient, he said, is “a fair question to debate.”

Since 2000, there have been 35 investigations by the FTC and three by the Department of Justice (DOJ) against physicians; all but one focused on price-fixing. According to Joshua Soven, JD, chief of the DOJ’s Antitrust Division, Litigation I Section, none of these cases were close calls. In his view, the physicians involved were not “collaborating, coming up with something better, reducing fragmentation in a productive way, or otherwise doing anything but agreeing upon a price that they will offer to insurance companies.”

But concerns about carrier dominance has prompted a shift in the allocation of DOJ antitrust resources. The most recent investigation by the DOJ concerns potential antitrust violations by an insurance company. Mr. Soven noted that the DOJ is now devoting more resources to investigating health insurers, particularly in concentrated markets.

“Any health insurance merger that comes before us gets enormous scrutiny,” he said. “But the primary issue in terms of concentration and competition—or lack thereof—is not mergers, but entry barriers,” which, antitrust legislation does not address.

According to Mr. Soven, smaller health insurance companies are going out of business. As hospitals reduce the number of company contracts and individuals move from smaller companies to larger companies, market concentration increases.

“Antitrust legislation is good at challenging the blockbuster deal between A and B, but it is not good at stopping this very gradual creep,” admitted Mr. Soven.

If, however, investigators can find entry barriers in the contracts between hospitals and health insurers, they can take action. For example, if a company negotiates a specific price for a certain service, and, as part of that negotiation, requires the hospital to charge any other health insurer a percentage above...

RED FLAG CONDUCT UNDER ANTITRUST LEGISLATION

Under antitrust legislation, “agreements” with competitors on the following topics are “red flag” concerns:

- Price fixing—fixing prices, credit terms, discounts, conditions of sale, negotiation “starting points,” pricing formulas
- Dividing markets—customers, territories
- Limiting output or capacity—disturbing supply/demand balance through collusive agreement
- Bid-rigging—agreeing not to compete in sale or purchase, including agreeing to take turns bidding on a rotating basis
- Group boycotts or group refusals to deal with a customer or supplier
- In addition, conversations with competitors can be interpreted as anticompetitive behavior after the fact. When meeting with competitors or at joint venture, trade association, competitor meetings (including local or national orthopaedic society meetings), orthopaedic surgeons should avoid discussion of the following topics:
  - Prices, pricing methods, or terms or conditions of sale
  - Whether to do business in certain territories
  - Pricing practices or strategies, including methods, timing, or implementation of price changes
  - Discounts, rebates, service charges, or other terms and conditions of purchase and sale
  - Price advertising
  - What constitutes a fair, appropriate, or “rational” price or profit margin
  - Whether to do business with certain suppliers, customers, or competitors
  - Complaints about the business practices of individual firms
  - The validity of any patent or the terms of a patient license
  - Confidential company plans regarding future product or service offerings
  - Any ongoing litigation