OPINION NO. 80-059

Syllabus:

It cannot be concluded, as a matter of law, that a private agreement between two hospitals, whereby one hospital agrees not to provide certain health care services in order that duplication of services may be avoided, will not violate the prohibition against restraints of trade or commerce set forth in R.C. Chapter 1331.

To: John H. Ackerman, M.D., Director, Department of Health, Columbus, Ohio
By: William J. Brown, Attorney General, September 30, 1980

You have asked for an opinion on the legality of a private contract between two hospitals by which one of the hospitals agrees not to provide certain specialized hospital services in competition with the second hospital for a ten-year period. Your request includes an outline, dated January 26, 1979, of the proposed contract, which states that the Westlake Health Campus Association ("Westlake Hospital") in Westlake, Ohio would agree with Lakewood Hospital not to provide eight tertiary care services—cardiac surgery, major vascular surgery, microscopic neurosurgery, joint replacement, microscopic ENT procedures, microscopic opthalmology procedures, cardiac catheterization laboratory services, and CAT scanner services—for ten years. The outline further specifies that, although the Westlake Hospital has planning approval to build a new hospital with 200 beds, it has no planning approval to provide the eight tertiary care services listed above. The information which you have provided indicates that Lakewood Hospital is concerned that the provision by Westlake Hospital of the services in question would result in a duplication of facilities, services, and equipment and could have an adverse impact on the ability of Lakewood Hospital to render quality health care at a low cost. The question is whether the proposed agreement would violate Ohio's antitrust law.

The legality of the proposed agreement hinges on the resolution of three issues: first, whether Ohio antitrust law applies to hospital services; second, if the law does apply, whether state and federal health planning provisions nevertheless exempt the proposed agreement from the antitrust law; and finally, if there is no exemption, whether the terms of the proposed agreement violate the antitrust law in that the contract would effect an impermissible restraint of trade.

Ohio's antitrust statute, known as the Valentine Act, appears in R.C. Chapter 1331. R.C. 1331.01(B) prohibits the formation of a trust in these words: " 'Trust' is a combination of capital, skill, or acts by two or more persons for any of the following purposes: (1) To create or carry out restrictions in trade or commerce. . . . A trust as defined in division (B) of this section is unlawful and void." The initial question, then, is whether hospital goods and services are "trade or commerce" within the meaning of R.C. 1331.01(B). Although the Ohio Supreme Court has never been presented with this precise question, there is nevertheless convincing Ohio Supreme Court authority to the effect that the Valentine Act does cover all such services.

The Ohio Supreme Court has held that the Valentine Act is declarative of, and in some respects reaches beyond, the common law. State v. Gage, 72 Ohio St. 210, 230-231, 73 N.E. 1078, 1080-1081 (1905); State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 546, 56 N.E. 464, 466-67 (1900). When the Valentine Act was adopted in 1898, 1898 Ohio Laws 143 (S.B. 336, eff. July 1, 1898), the common law prohibitions on restraints of trade were applied to agreements involving physicians and medical services exactly as they were applied to other forms of commerce. See, e.g., Lange v. Werk, 2 Ohio St. 519, 535 (1853). Thus, the legal foundation for the premise that the prohibitions against restraint of trade appearing in the Valentine Act apply to agreements involving physicians and medical services in the same manner as they do to other forms of commerce is the

Ohio common law. See generally Droba v. Berry, 2 Ohio Op. 2d 50, 51, 139 N.E. 2d 124, 126 (C.P. Trumbull County 1955). Since the common law restraints are considered to be part of the law relating to the Valentine Act, the Ohio antitrust law must, in turn, be read to apply to medical services.

In addition to this common law foundation, the legislative and case law history of the Valentine Act indicates that the Act was intended to apply to every form of enterprise. For example, the Act's preamble declares its purpose to be "to promote free competition in commerce and all classes of business in the state." 1898 Ohio Laws at 143. Furthermore, the courts have declined to exclude any form of enterprise from the Valentine Act without express legislative direction. United States Telephone Co. v. Central Union Telephone Co., 202 F. 66, 70 (6th Cir.), cert. denied, 229 U.S. 620 (1913); Rayess v. Lane Drug Co., 138 Ohio St. 401, 35 N.E. 2d 447 (1941). Hospital services enjoy no such express exemption from the Valentine Act. Thus, although there is no case precisely on point, previous interpretations of the Valentine Act would clearly extend the Act's coverage to the instant case. Indeed, pursuant to my duty to enforce the state's antitrust law, I have in the past filed suit under the Valentine Act against an agreement in restraint of trade in the health care market. See State ex rel. Brown v. Alliance Dental Society, 1976-1 Trade Cases ¶60, 944 (C.P. Stark County 1976).

In addition to cases discussing Ohio law, the court decisions construing federal antitrust law are also relevant in deducing the reach of the Valentine Act. The Ohio Supreme Court has consistently stated that federal precedent should be applied when interpreting Ohio's antitrust law since the Valentine Act was patterned after §3 of the Sherman Act, 15 U.S.C. §3. List v. Burley Tobacco Growers Co-op Association, 114 Ohio St. 361, 374, 151 N.E. 471, 475 (1926).

The Supreme Court of the United States applied federal antitrust law to the health care field in American Medical Association v. United States, 317 U.S. 519 (1943). The Court, quoting the opinion of the District of Columbia Court of Appeals with approval, noted: "The [District of Columbia Court of Appeals] said: 'And of course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits "any person" from imposing the proscribed restraint. . . .'" 317 U.S. at 528-529. See also Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) ("learned professions" constitute "trade or commerce" within coverage of the Sherman Act); United States v. Oregon State Medical Society, 343 U.S. 326 (1952); United States v. College of American Pathologists, 1969 Trade Cases ¶72, 825 (N.D. Ill. 1969).

Accordingly, it is my opinion that, for the reasons set forth above, hospital and professional services constitute trade or commerce which is subject to the antitrust law of Ohio.

In light of the general applicability of the antitrust laws to hospital services, the next question is whether state and federal health planning provisions nevertheless exempt the proposed agreement from the strictures of the Valentine Act. To resolve this issue, the agreement in question must be analyzed in the context of each of the following: the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§300k-300t (Supp. 1978); the Ohio Health Planning and Development Law, R.C. Chapter 3702; and, of course, the antitrust law of Ohio.

The purpose of the federal and state health planning provisions cited above is to control health care costs by requiring hospitals and other health care providers to obtain a certificate of need before undertaking new health services like those described in the proposed agreement. Two types of administrative agencies are to function in each state: a local Health Systems Agency (HSA), and a State Health Planning and Development Agency (SHPDA). R.C. 3702.51(G)-(H); R.C. 3702.58(A)(2); 42 U.S.C. §§300l-1(c), 300m, 300m-2. The HSA and SHPDA have the duty to determine whether the proposed services are needed in the pertinent market area, and they have the primary responsibility as to the disposition of an application for a certificate of need. R.C. 3702.54; 42 U.S.C. §§300l-2, 300m-2. Both the state and federal health planning laws require that certificate of need

decisions be made by public agencies, expressly made accountable to consumer rather than provider interests. R.C. 3702.58(A)(2); R.C. 3702.61; 42 U.S.C. §§3001-1(c), 300m, 300m-2. The General Assembly's decision to delegate certificate of need decisions to accountable public agencies, rather than to providers, is manifest in the fact that Am. Sub. S.B. 349, 112th Gen. A. (1978) (eff. March 15, 1979), which enacted R.C. Chapter 3702, replaced and repealed former R.C. 3701.85-.86, under which the provider-dominated Public Health Council had a prominent role in planning for the provision of health services.[1] It is apparent, then, that the current statutory scheme neither envisions nor sanctions private agreements among providers to decide what institutional health services each shall market. Such decisions have been delegated by explicit legislative choice to HSA's and SHPDA's accountable to the public. Private provider agreements as to these issues have the capacity to infringe upon the lawful authority of these public agencies. In the situation you describe, a private decision to grant Lakewood Hospital the right to offer eight services for a ten-year period, and to deny Westlake Hospital the right to offer such services during that period, would be imposed on the community regardless of future determinations of need by the HSA or SHPDA.

The final question is whether the terms of the proposed agreement do in fact violate the Valentine Act. Based on the facts discussed above, it is entirely possible that a court would find the proposed contracts between the two hospitals to be a market sharing agreement which impermissibly restrains trade, in violation of the Valentine Act. See, e.g., United States v. Topco Associates, 405 U.S. 596 (1972) (per se rules against market division agreements). Of particular note is the case of St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), where the Supreme Court found a private agreement to allocate customers to be a per se violation. Of course, there may be redeeming competitive features, not apparent from the facts before me, which might prompt a court to require more extensive factual inquiry to determine the legality of the agreement under Ohio's antitrust law. See, e.g., North Pacific Railway v. United States, 356 U.S. 1, 5 (1958) (per se rules apply only to agreements that have a " pernicious effect on competition and lack any redeeming virtue"). Nonetheless, based on the facts that you have presented, I cannot conclude that the proposed agreement would be in compliance with R.C. Chapter 1331. I am, therefore, unable to state a present intention not to bring an action under the antitrust law should the proposed agreement be consummated.

In conclusion, then, it is my opinion, and you are hereby advised, that it cannot be concluded, as a matter of law, that a private agreement between two hospitals, whereby one hospital agrees not to provide certain health care services in order that duplication of services may be avoided, will not violate the prohibition against restraints of trade or commerce set forth in R.C. Chapter 1331.

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[1]The Public Health Council retains a myriad of health-related responsibilities. See, e.g., R.C. 3701.33-.35 (general duties); R.C. 3715.69 (pure food and drug regulation); R.C. 3733.21 (regulation of agricultural labor camps).