

# New York Law Journal



Web address: <http://www.law.com/ny>

VOLUME 228—NO. 21

THURSDAY, AUGUST 1, 2002

## OUTSIDE COUNSEL

BY GORDON SCHNELL

### *An Antitrust Challenge to the National Resident Matching Program*

A group of current and former medical residents has challenged on antitrust grounds the National Resident Matching Program (NRMP), the 50-year-old system that “match- es” medical students with residency programs.<sup>1</sup> The lawsuit was filed in May in federal district court in Washington, D.C.

The case, which could ultimately drag into court up to 1,000 of the country’s top hospitals, has sent shivers through the health care industry — and for good reason. A win for the residents could cost the hospitals tens of billions of dollars, putting the entire industry in financial turmoil. That win, however, is far from certain.

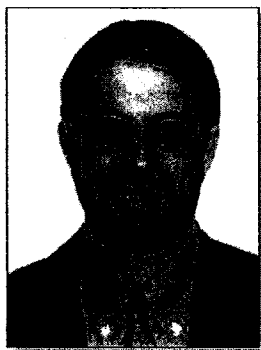
Under the NRMP, fourth-year medical students and training hospitals enter into an annual dance where pairings are determined by a computer sorting of both side’s rank-order listings. Proponents of the program claim it results in the most efficient and competitive allocation of students to hospitals.

Not so, say the complaining residents, who view the program as nothing but a device used by hospitals to eliminate competition in their search for resident physician services. The end result, they contend: low wages, horrendous hours, menial labor, and poor patient care.

The residents may have something here. But, in order to convince the court, they will have to overcome the tendency by courts to view conduct involving education or the professions with special solicitude under antitrust laws. The sensitivity will likely be even more pronounced here, where the financial stability of the entire health care system is at risk. How this case ultimately turns out will depend on whether the benefits of the NRMP measure up against the program’s apparent per se anticompetitive construct.

#### The Matching Program

The NRMP was created in 1952 to bring order to the chaotic process under which



medical students and residency programs find one another. Because of a recurring surplus of residency positions, hospitals were drawn into a mad dash every year to grab as early as possible the most attractive medical students. Even the

---

*“... Complaining residents ...  
view the program  
as nothing but a device used  
by hospitals to eliminate  
competition in their search for  
resident physician services.”*

---

most prestigious institutions got sucked into the frenzy for fear of losing choice candidates to earlier offers from competing hospitals.

Students fared no better. Rather than hold out for their preferred programs, they were swept into accepting positions early for fear of coming up empty later. Students were often pressured into choosing residencies well before they had a clear idea of the specialty they wished to pursue — sometimes as early as the second year of medical school. This haphazard approach resulted in a misallocation of student-hospital preferences. In other words, everyone was settling for less.

The NRMP was designed to change all this. And, apparently, it has. By locking in participants to computer generated “matches”

on a fixed date every year, the program has replaced what was a harried free-for-all with a standardized and efficient mechanism that optimizes the residency selection process. The system ensures there can be no student and hospital that are not matched who would prefer to be matched.

#### Residents’ Challenge

The complaining residents view the matching program and its origins in an entirely differently light. According to their suit, the NRMP has nothing to do with redressing inherent flaws or inequities in an unregulated application process. Rather, the program was intended simply to serve as a vehicle for hospitals to avoid competing with one another for residents based on salary or other terms of employment.

To prove their point, the residents look to the self-articulated goal of the NRMP itself: “The sole purpose of the matching program is to allow both applicants and programs to make selection decisions on a uniform basis and without pressure.” Anticompetitive stratagem or efficiency enhancing tool? Therein lies the dispute.

From a stark antitrust perspective, the residents definitely have the upper hand. Agreements among competitors to fix prices, allocate markets, or otherwise refuse to compete are per se illegal under the antitrust laws. Accordingly, the NRMP — with its fixed allocation of residency positions — would appear unlawful on its face regardless of any benefits or efficiencies the program may bring about. But most courts will not apply per se treatment in such a mechanical fashion when the challenged practice involves professional or educational services, as it does here.

The Supreme Court set the stage for this more relaxed approach to antitrust review more than 25 years ago when it declared that commercial and non-commercial conduct may be treated differently under the antitrust laws.<sup>2</sup>

Such a double standard is intended to account for the public service attributes that may be rooted in conduct involving education or the professions, or otherwise arises outside of

---

**Gordon Schnell** is a partner at Constantine & Partners.

a pure commercial setting. For the most part, courts have wholly endorsed this dual approach to antitrust review. Practices that courts would otherwise summarily condemn as per se illegal are routinely evaluated under a more forgiving standard to give full consideration to any redeeming virtues.

For the residents, this dynamic may prove difficult to surmount. Not only will they have to demonstrate the traditional elements of a per se antitrust offense — such as an anticompetitive restraint, and actual damages resulting from the restraint — but they also will have to confront the full panoply of program efficiencies and justifications that the defending hospitals will surely proffer in support of the NRMP.

### The Ivy Leagues

This is exactly the scenario that undermined the seemingly airtight price-fixing case brought a decade ago by the Justice Department against Ivy League schools.<sup>3</sup>

There, the government challenged the universities' practice of collectively setting the amount of financial aid they offered to commonly admitted students, a practice with strong parallels to the NRMP. The district court sided with the government and struck down what it viewed as a plainly anticompetitive practice. The Third Circuit reversed and remanded the decision chiding the lower court for failing to fully consider the practice's procompetitive and social welfare justifications.

What is most notable about this decision is the Third Circuit's recognition that the challenged practice was anticompetitive on its face because it eliminated price competition between competing schools.

Nevertheless, the circuit criticized the lower court for failing to engage in a thorough evaluation of the practice's justifications before ruling on its validity. The circuit deemed such an approach essential to determining whether the practice actually suppressed competition, or merely regulated it to ultimately enhance it and achieve certain social benefits.

The U.S. Supreme Court never had the opportunity to review this decision, but it has recently chastened a court for similarly giving short shrift to what appeared on its face to be an anticompetitive restraint.<sup>4</sup>

### Case Sent Back

In that case, the government challenged a dental association's policy restricting member-dentists from engaging in certain forms of price and quality advertising. After a cursory analysis, the Ninth Circuit condemned the policy as a naked restraint on price

competition and output. The Supreme Court sent the case back, commanding the circuit to more carefully review the policy, particularly in light of the professional context in which it arose.

There is little question that despite its anticompetitive facade, the NRMP falls squarely within this special category of restraints that must be evaluated under a more relaxed antitrust standard. When it is, there may be numerous benefits to the NRMP that become apparent, while many of the alleged harms may lose some of their luster.

The hospitals will likely argue the program has brought efficiency and fairness to what was an otherwise unwieldy process; optimized the preferences of the participating medical students and hospitals; allowed students to make more educated decisions about what specialties they wish to pursue; and minimized the process' disruption on medical school.

They might further argue that these and other program attributes have increased the supply of residents, improved the caliber of

---

*“Life for medical residents is bound to change, at least with respect to their grueling hours. Whether they succeed in abolishing the NRMP is a much thornier issue.”*

---

their training, and boosted the overall quality of health care in this country.

These are exactly the type of procompetitive and public interest justifications that courts have found compelling in their evaluation of analogous non-commercial restraints.

Unless the residents can show that these and any other legitimate justifications could have been achieved through a less-restrictive alternative to the NRMP, their challenge may come up flat. Apparently, one such alternative — simply having a uniform residency appointment date — has already been pursued and failed miserably.

The residents' challenge may also falter if they fail to substantiate their allegations of competitive harm. The residents' principal complaint is that the NRMP eliminates competition among hospitals for residents. While the mandatory “matching” element of the program does remove the ability of hospitals to compete for residents post-match, it does not necessarily impact the level of competition that can exist in the pre-match phase. Hospitals are free to set the terms of their residency programs in the manner they feel will be most attractive to prospective

residents. And they have a strong interest in doing so to ensure their high placement on their preferred candidates' match lists.

The residents' grievance about low wages might also be viewed as somewhat amiss because it entirely ignores the training and educational aspects of the residency program. Moreover, it assumes a direct causal connection with the NRMP that is not necessarily apparent. In this regard, many hospitals pay residents hired through the NRMP the same salary as those hired outside the program.

Further complicating the residents' complaint about wages is the government subsidization of resident salaries through Medicaid and Medicare and the non-profit structure of each of the hospitals named in the lawsuit.

Even the complaint about their long hours — perhaps the residents' most legitimate gripe — is not as straightforward as it might otherwise seem. There may be legitimate reasons for the long and uninterrupted hours that residents, like all doctors, must put in relating to the quality of continuous patient care they provide.

In addition, the Accreditation Council for Graduate Medical Education, one of the principal defendants in this lawsuit and the organization responsible for accrediting most of the country's training hospitals, recently announced that it would impose strict limits on residents' hours. This comes on the heels of proposed federal legislation that would impose similar restrictions on a national level. New York already has such rules.

### Conclusion

Whatever happens, life for medical residents is bound to change, at least with respect to their grueling hours. Whether they succeed in abolishing the NRMP is a much thornier issue.

Indeed, antitrust laws are about protecting competition. And yes, certain competitive restraints are so likely to harm competition that they should be stricken with little analysis. But, the NRMP is not one of them.

It clearly belongs in the special class of restraints that must be carefully and flexibly considered, lest the ultimate beneficiary of the antitrust laws — the public — end up the real loser.

---

(1) *Jung v. Assoc. of American Medical Colleges*, 1:02CV00873 (D. D.C.).

(2) *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975).

(3) *U.S. v. Brown Univ.*, 5 F.3d 658 (3rd Cir. 1993).

(4) *California Dental Assoc. v. Federal Trade Comm.*, 526 U.S. 756 (1999).