

The Quality Health-Care Coalition Act of 1999: Should Congress Broaden Antitrust Exemptions?

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I. INTRODUCTION: THE HEALTH CARE DEBATE

The healthcare market is vastly different now as compared to the late 1980s.¹ In the last five years, scholars, politicians, and citizens have debated health care issues.² It was even a central issue in the last presidential election.³ The introduction of managed care organizations (MCOs) and concerns that health care is too expensive cause physicians to believe that they have little control over their practices.⁴

Congressman Tom Campbell's belief that MCOs have too much leverage over health care providers prompted him to introduce into Congress a bill entitled *The Quality Health-Care Coalition Act of*

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1. Jeremy Lutsky, *Is Your Physician Becoming a Teamster: the Rising Trend of Physicians Joining Labor Unions in the Late 1990's*, 2 DEPAUL J. HEALTH CARE L. 55 (1997).

2. See, e.g., 137 CONG. REC. S18324 (daily ed. Nov. 26, 1991); 138 CONG. REC. E. (daily ed. Oct. 9, 1992); Matthew Cooper, *The Selling of the President's Health Care Proposals*, U.S. NEWS & WORLD REP., Apr. 12, 1993, at 29.

3. Joseph P. Shapiro, *Giving Doctor's the Final Word*, U.S. NEWS & WORLD REP., Nov. 22, 1999, at 20, 20-24.

4. Lutsky, *supra* note 1, at 55. "Today the health care industry is controlled not by the physician, but by large insurance companies, health maintenance organizations (HMO's), physician practice management companies and for-profit corporations." *Id.* A journalist stated:

The merciless erosion of medical decision making capability and professional influence has resulted in a sense of untold frustration and hopelessness [among physicians]. This dawning of physician discontent has provided the intellectual fodder for the revival and popularity of unionism as a proactive strategy to right the wrongs of this era and return the economic and power leverage to physicians.

Id. at 55-56 (citing Joseph L. Murphy, *Physician Unions: Bane or Balm?* CHI. MED., Aug. 21, 1997, at 1,2); see also, Francis J. Serbaroli, *When Physicians Try to Unionize Against HMO's*, N.Y.L.J., Nov. 30, 1998, at 3, 7; *Independent Doctors Seek Right to Organize, Yet Refuse to Consider Work Stoppages*, BNA HEALTH CARE POL'Y REP., June 1998.

1999 (Health Care Act).⁵ In summary, the Health Care Act provides that health care professionals engaged in negotiations with health plans regarding contract terms may enjoy the antitrust exemptions to which labor unions are entitled in collective bargaining. The limitation is that health care professionals are not entitled to participate in a “collective cessation” or strike of any service to patients.⁶

A mixture of congressional and judicial action created the current antitrust exemptions. Neither branch created broad, sweeping exemptions. Therefore, in order to maintain an effective antitrust law, Congress should not now create an exemption for physicians who have other means of protecting themselves in the market than through antitrust exemptions.

This Note shows that an antitrust exemption for physicians is contrary to labor policy, antitrust policy, and public policy. Part II of this Note explores the creation of the labor exemption and other exemptions created or rejected by the judiciary and Congress. Part III

5. Quality Health-Care Coalition Act of 1999, H.R. 1304, 106th Cong. (1999).

6. In pertinent part:

Sec. 3. Application of the Antitrust Laws to Health Care Professionals Negotiating with Health Plans.

(a) *In General.*—Any health care professionals who are engaged in negotiations with a health plan regarding the terms of any contract under which the professionals provide health care items or services for which benefits are provided under such plan shall, in connection with such negotiations, be entitled to the same treatment under the antitrust laws as the treatment to which bargaining units which are recognized under the National Labor Relations Act are entitled in connection with such collective bargaining. Such a professional shall, only in connection with such negotiations, be treated as an employee engaged in concerted activities and shall not be regarded as having the status of an employer, independent contractor, managerial employee, or supervisor.

(c) *Limitation.*—The exemption provided in subsection (a) shall not confer any right to participate in the collective cessation of service to patients not otherwise permitted by law.

(d) *Definitions.*—For purposes of this section:

(3) *Health Care Professional.*—The term “health care professional” means an individual who provides health care items or services, treatment, assistance with activities of daily living, or medications to patients and who, to the extent required by State or Federal law, possesses specialized training that confers expertise in the provision of such items or services, treatment, assistance, or medications.

provides a summary of physicians' current relationship with MCOs, a brief overview of the current ability of physicians to unionize, and the opposing theories behind the Health Care Act. Finally, Part IV analyzes the Health Care Act in light of the policies underlying the antitrust law and the exceptions to the antitrust law. This analysis shows that the Health Care Act is not the proper way to eliminate physician complaints against MCOs or to increase the quality of patient care. Part V further presents a proposal for the adoption of the Patient Bill of Rights, rather than the Health Care Act.

II. THE CREATION OF THE LABOR EXEMPTION

Unions began in a time when employees had no rights.⁷ Employers forced their employees to work grudging hours, subjected them to horrific working conditions, and paid them nominal wages.⁸ Through unions, these employees eventually negotiated with the employers to obtain reasonable working hours, clean working environments, and livable wages.⁹

A. *The Early Years*

Since the early 1800s, courts struggled over employee's use of concerted activity and generally ruled against the employees in one manner or another.¹⁰ When Congress enacted the Sherman Anti-Trust

7. KENNETH A. KOVACH, PRACTICAL LABOR RELATIONS 3 (1986) ("For the first 150 years of this country's independence, the American worker was free politically, but a virtual slave industrially."). President Cleveland summarized America's situation:

As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.

Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 12-13 (1983).

8. The management practices of companies subjected the workers to inflated prices for company owned housing, water supplies and stores, unsafe and unhealthy working conditions, long work weeks, extremely low wages, and arbitrary employment and personnel practices. KOVACH, *supra* note 7, at 3. The company even had its own police force. *Id.*

9. *Id.*

10. *See* Commonwealth v. Pullis, Phila. Mayor's Ct. (1803), *reprinted in* A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (John R. Commons et al.

Act (Sherman Act),¹¹ declaring monopolistic activity illegal, the court found a more flexible means of ruling against unions. The Sherman Act marks the beginning of a long conflict between the federal judiciary and the legislature. In *Loewe v. Lawler*,¹² the court struck down actions of a union as interfering with the employer's trade in contravention of the Sherman Act.¹³

In response, the legislature mandated a less strict approach in the Clayton Act.¹⁴ Although the legislature appeared to give more

eds., 1958) (1910-11); *See also* Commonwealth v. Hunt, 38 Am. Dec. 346 (Mass. 1842) (abandoning criminal penalties to use civil penalties where the employees have an "illegal purpose" or use "illegal means").

11. The Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

15 U.S.C. § 1 (1994).

12. 208 U.S. 274 (1907).

13. A primary and secondary boycott by employees interferes with the employer's trade and is a violation of the Sherman Act. *Id.* at 303-04; *see also* E. States Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1913) (holding use of a black list to influence retailers to refrain from dealing with listed wholesalers constitutes a violation of the antitrust act).

14. The Clayton Act provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1999). The Clayton Act further provides:

That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the

freedom to labor unions by mandating that the antitrust laws were not to be interpreted as forbidding unions entirely or as forbidding unions from lawfully carrying out their legitimate objects, the judiciary refused to interpret the Sherman Act more liberally. In fact, the Court continued to find labor activity illegal under the Sherman Act. In *Duplex Printing Press, Co. v. Deering*,¹⁵ the Court held that § 20 of the Clayton Act does not exempt a union from liability under the Sherman Act.¹⁶

B. The Legislature Takes Control

Although the Court relented on antitrust exemptions in general, it continued to find against labor unions until the legislature intervened. In 1921, the Court rejected antitrust protection for unions, but created

purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1994).

15. 254 U.S. 443 (1921). A secondary boycott is not a legitimate object of a union. *Id.* at 474-79.

16. Essentially, the Court held that it may withdraw the shield of Clayton Act protection where it deems the union's object "illegitimate." The Court narrowed the scope of normal union activities to those involving the employees and the primary employer. Where the union affects "innocent people" who are remote from the original dispute, the union will not be given protection from liability under the Clayton Act. *Id.* at 477-78. The Court states:

Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws . . . [A broad reading of Section 20] would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned . . . [giving unions] a control over commerce among the States that is denied to the governments of the States themselves.

Id. at 471-73. The dissent argued that the Clayton Act was designed to equalize the positions of workmen and employers as industrial combatants with respect to the law. *Id.* at 484.

an antitrust exemption for major league baseball.¹⁷ The judiciary did, however, limit the baseball exemption by refusing to extend its application to any other sport or to the entertainment industry.¹⁸

Following *Coronado Coal*, the legislature enacted the Norris-LaGuardia Act that declared the “public policy of the United States” mandates that workers have the right to organized representation.¹⁹

17. See *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (holding that a union’s intent to restrain or control the interstate market is enough to predicate a Sherman Act violation). In *Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Clubs*, 259 U.S. 200 (1922), the court held that baseball was not subject to antitrust laws because the transport of players across state lines was merely incident to the exhibition of the games. *Id.* at 208.

18. The baseball exemption created controversy in the years following, but the Court determined that the exemption was one for the legislature to cure, not the judiciary. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). The Court held that more harm than good would come from overruling the exemption created in the twenties because baseball made substantial changes with great cost when the Court handed down the *Federal Baseball* decision. *Id.* at 357. It based its decision on two factors. First, Congress was aware of the rule for thirty years and had not promulgated legislation changing it. *Id.* Second, the business of baseball developed for thirty years under the knowledge that it was not subject to antitrust laws. *Id.* Thus, the Court concluded that the choice was one for the legislature. The legislature and the court refused to extend the baseball exemption to other organized sports and exhibition businesses. In 1951, four separate bills that would exempt other organized professional sports were introduced into Congress; however, none were passed. See *Radovich v. NFL*, 352 U.S. 445, 450 n.7 (1957). In 1955, the judiciary confronted exhibition businesses in *United States v. Shubert*, 348 U.S. 222 (1955), and sports other than baseball in *United States v. International Boxing*, 348 U.S. 236 (1955), to determine that the baseball exemption should not be extended to these businesses. In *Shubert*, the Court based its decision on the *Toolson* factors holding that the judiciary should not provide other businesses the exemption because they do not have the same background; that the decision to extend the baseball exemption to other business was for the legislature. *Shubert*, 348 U.S. at 230. In *International Boxing*, the Court decided that it was a question for the legislature since it is a question of granting, instead of extending, the *Federal Baseball* exemption. *Shubert*, 348 U.S. at 243-44; see also *Radovich v. NFL*, 352 U.S. 445 (1957) (stating that more likely than not, were baseball to be decided “on a clean slate,” it would be decided differently, so other sports will not be given the exemption); *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205 (1971) (declaring that “[b]asketball . . . does not enjoy exemption from the antitrust laws”).

In 1998, Congress acted on the suggestion of the Supreme Court and revoked a portion of the baseball antitrust exemption by amendment to the Clayton Act, providing:

[T]he conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged by persons in any other professional sports business affecting interstate commerce.

The Curt Flood Act of 1998, 15 U.S.C. § 27(a) (Supp. V. 1999).

19. The Norris-LaGuardia Act provides:

Three years later, the legislature stepped in as the primary labor policymaker by promulgating the Wagner Act, commonly known as the National Labor Relations Act (NLRA),²⁰ explicitly giving employees the right to join labor unions.²¹ The NLRA²² is the primary statute regulating labor relations and collective bargaining.²³ The National Labor Relations Board (NLRB) is the administrative agency in charge of regulating labor unions.²⁴ The purpose of the NLRA is to promote collective bargaining and balance the power between employees and employers.²⁵ It regulates the relations between employees and employers and only considers the interests of third parties in situations involving industrial strife caused by unregulated, economic warfare between parties in labor disputes that

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment*, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from . . . interference . . . of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Norris-LaGuardia Act of 1932, 29 U.S.C. § 102 (1994) (emphasis added).

20. National Labor Relations Act of 1935, 29 U.S.C. § 151 (1994).

21. See *infra* notes 27-28 and accompanying text.

22. 29 U.S.C. § 151 (1994). The National Labor Relations Act addresses:

[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.

Id. It provides, in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id. § 151(1).

23. See WILLIAM B. GOULD, IV, A PRIMER ON AMERICAN LABOR LAW 26 (3d ed. 1993).

24. See Lutsky, *supra* note 1, at 55, 63.

25. See 29 U.S.C. § 151 (1994) (describing the findings and policies behind the NLRA).

occurred prior to the passage of the NLRA.²⁶

The NLRA creates an obligation between both the employer and the representative of employees to bargain collectively.²⁷ However, it does not create an obligation on either party to agree to the other's proposal or to make concessions.²⁸ Because an employer must only

26. John J. Deis, Comment, *The Unionization of Independent Contracting Physicians: A Comedy of Errors*, 36 HOUS. L. REV. 951, 962 (1999); see also 29 U.S.C. § 157 (1994) (making no mention of the rights of third parties).

27. The NLRA gives general guidelines for determining what constitutes an employee:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . but shall not include any individual having the status of an independent contractor, or any individual employed as a supervisor.

29 U.S.C. § 152(3) (1994). Although the NLRA explicitly rejects independent contractors from employee status, many cases have found that other types of workers, generally considered independent contractors, were employees deserving protection of the NLRA. See, e.g., *Roadway Package Sys.*, 288 NLRB 196 (1988) (finding truck drivers to qualify as employees because of the amount of control exercised by the employer over the driver's routine and the driver's lack of entrepreneurial freedom); *Blackberry Creek Trucking*, 291 NLRB 474, 480 (1988) (finding truck drivers to qualify as employees based upon employer disciplinary rules and prohibitions); *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968) (holding musicians deserve protection of the NLRA); *Home Box Office v. Dir. Guild of Am.*, 531 F. Supp. 578 (S.D.N.Y. 1982) (screen directors are entitled to protection of the NLRA). A supervisor is defined as:

. . . any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Collective bargaining is defined as:

[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party

29 U.S.C. § 158(d) (1994); see also, *Lutsky*, *supra* note 1, at 63-64 (The act "creates a legally enforceable right for employees to organize, requires employers to bargain with employees through employee elected representatives, and gives employees the right to engage in concerted activities for collective bargaining purposes or other mutual aid or protection.")

28. Deis, *supra* note 26, at 963; see also *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Once a demand is made, the opposing party must make a counter proposal, but that proposal may be the existing wages and working conditions. Deis, *supra* note 26, at 963 n.84; see also *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (holding

engage in “good faith” discussions with the union, the union’s ability to obtain requested terms depends largely upon its economic power.²⁹

The NLRA, as construed by the judiciary, contains three categories of bargaining: mandatory subjects, permissive subjects, and precluded subjects.³⁰ Mandatory subjects of bargaining are contractual terms that require bargaining under § 8(a)(5) of the NLRA and include wages, hours, and other terms and conditions of employment.³¹

Five years after the passage of the NLRA, the Court appeared to retreat from the fight against the legislature.³² In *Apex Hosiery v. Leader*,³³ the Court limited union liability under the Sherman Act. The Court noted that the Sherman Act was not aimed at interstate transportation of goods, but at eliminating “trusts” and “combinations” of businesses that controlled the market by suppression of competition.³⁴ The Court concluded that restraints on transportation in interstate commerce are not violative of the Sherman Act unless they are intended to have, or in fact have, direct effects on the market.³⁵ In *United States v. Hutcheson*,³⁶ the Court

employer must “participate actively in the deliberations so as to indicate a present intention to find a basis for agreement”).

29. Deis, *supra* note 26, at 963; *see also* NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 488-89 (1960) (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system”); NLRB v. Am. Nat’l Ins. Co., 343 U.S. 395 (1952) (holding the NLRB “may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements”).

30. *See* GOULD, *supra* note 23, at 105-07 (1993); *see also* NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958) (stating terms of a contract fall into three categories: illegal subjects, mandatory subjects, and voluntary subjects).

31. GOULD, *supra* note 23, at 107 (examining the holding of *Borg-Warner*). The NLRB examines practices on a case by case basis to determine what constitutes a term and condition of employment. *See* Ford Motor Co. v. NLRB, 441 U.S. 488, 494-95 (1979). Some considerations are whether the practice is germane to the workplace, whether the practice involves a managerial decision at the heart of entrepreneurial control, and whether it is general industry practice. *Id.* at 498-501.

32. *See infra* text accompanying notes 33-39.

33. *Apex Hosiery v. Leader*, 310 U.S. 469 (1940).

34. The Court excused its prior application of the antitrust law by stating that in all cases where it previously applied the Sherman Act to unions, the activities affecting interstate commerce were “directed at control of the market and were so widespread as substantially to affect it.” *Id.* at 506.

35. *Id.* at 510-11. The Sherman Act was not intended to apply to restraints that “fall short, both in purpose and effect, of any form of market control of a commodity.” *Id.* at 512. In

created the “judicial exemption” which relied on the spirit of the labor statutes to protect labor unions from federal court interference when the union is carrying out its lawful objectives.³⁷ Through the blending of the Clayton Act and the Norris-LaGuardia Act, *Hutcheson* defined the statutory immunity from antitrust laws for unilateral labor union conduct.³⁸ This non-statutory prong of the labor exemption eventually allowed groups previously included in antitrust prosecutions to unite and form unions.³⁹

dictum the Court stated:

Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

Id. at 503-04. Chief Justice Hughes filed a strong dissent arguing that the activities by the union were a direct and intentional prevention of interstate commerce. *Id.* at 514.

36. 312 U.S. 219 (1941). The Court held a peaceful attempt by union members to convince other unions to refuse to work for an employer was plainly authorized by the Clayton Act. *Id.* at 232.

37. The Court stated:

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the ‘public policy of the United States’ in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Id. at 231.

38. Justice Frankfurter stated in *Hutcheson*:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232; *see also* Deis, *supra* note 26, at 955; Hoffman, *supra* note 7, at 25.

39. *See generally* Nat’l Basketball Ass’n v. Williams, 45 F.3d 684 (2d Cir. 1995) (applying the non-statutory antitrust exemption to basketball); Mackey v. Nat’l Football League, 543 F.2d 606 (8th Cir. 1976) (applying the non-statutory antitrust exemption to football). So long as employees are bargaining through their union with an employer over such terms of employment as wages or working conditions, and the effect on the market is only incidental, the non-statutory labor exemption will apply to the agreement. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622-35 (1975).

C. The Court Narrows the Exemption

Unions enjoyed substantial growth between 1941 and 1945, but in 1945 the Court reined in the judicial labor exemption. In *Allen Bradley v. IBEW*,⁴⁰ the Court held that where the union enters into a bargaining agreement with third parties and where such agreement restricts the market, the *Hutcheson* exemption does not apply.⁴¹ Two years later, the legislature enacted the Taft-Hartley Act, which codified *Allen-Bradley*.⁴² The Taft-Hartley Act prohibited unions from engaging in specific activities such as secondary boycotts, jurisdictional strikes over work assignments, and strikes to force an employer to fire a person because of his or her union affiliation or lack thereof.⁴³

The Taft-Hartley Act did not end the controversy over the labor exemption. Two cases decided in 1965 showed the Court's division over what course the labor exemption should take. In *United Mine Workers v. Pennington*,⁴⁴ a plurality held that a multi-employer bargaining agreement that sets product prices is not exempt from antitrust laws.⁴⁵ Further, the *Hutcheson* exemption is lost when the union colludes with an employer to drive smaller operators out of the market.⁴⁶ However, Justice White approved of an exemption for

40. 325 U.S. 797 (1945).

41. *Id.* at 811. The Court stated that the intricate "program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business from that area, and to charge the public prices above a competitive level" was "a violation of the Act . . ." *Id.* at 809, 811.

42. Labor Management Relations Act, 1947 (Taft-Hartley Act § 120), 29 U.S.C. § 141 (2000).

43. *Id.* § 158(b)(4).

44. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

45. *Id.* at 662. The Court split three ways. Justice White wrote the opinion for the Court joined by Chief Justice Warner and Justice Brennan. Justice Douglas concurred in a separate opinion joined by Justice Black and Justice Clark differing from the Court's opinion only in the amount of evidence necessary for a prima facie case. *Id.* at 674-75. Justice Goldberg wrote a separate opinion for the dissent joined by Justice Harlan and Justice Stewart arguing that *Apex* and *Hutcheson* showed an intent to immunize collective bargaining over mandatory subjects. The dissent also argued the Court's opinion would cause underground conversations or cause the union to resort to strikes for higher wages because the Court's willingness to infer a prohibited agreement from union conduct. *Id.* at 676.

46. *Id.* at 663. Justice White acknowledged the *Apex* holding that agreements on wages may have an effect on the product market without being subject to the Sherman Act. *Id.* at 664-66. However, Justice White warned:

multi-employer bargaining over wages to be paid by the multi-employer group's members since the restraint on the market relates to the elimination of wage competition which is not proscribed by the Sherman Act.⁴⁷ Even this exemption can be lost if a union agrees with a group of employers to impose a wage scale on other employers.

In *Amalgamated Meatcutters and Butchers Workmen v. Jewel Tea Co.*,⁴⁸ the Court held that an agreement between the union and an employer regarding hours of work is subject to the antitrust exemption.⁴⁹ The Court developed a test for the antitrust exemption: a restraint on the commercial market must be no greater than necessary to preserve the union's legitimate interests in wages, hours, and working conditions.⁵⁰ Many questions remained following *Pennington* and *Jewel Tea*, but the Court left them unanswered for another decade.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining. . . . One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

Id.

47. *Id.* at 664.

48. 381 U.S. 676 (1965). The Justices were divided into the same groups as in *Pennington*. Cf. 381 U.S. 657 (1965).

49. 381 U.S. at 691. The Court stated:

[T]he issue in this case is whether the marketing-hour restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

Id. at 689-90. The consideration that determines whether an agreement falls under the antitrust exemption is the "relative impact on the product market and the interest of the union members," not the form of the agreement. *Id.* at 690 n.5. Justice Goldberg, joined by Justice Harlan and Justice Stewart, concurred in the result, but dissented from Justice White's opinion. In Justice Goldberg's opinion, the hours during which meat could be sold were a "proprietary" matter in the exclusive control of the employer, not a legitimate concern for the union. *Id.* at 726. He would exempt any mandatory subject of bargaining from antitrust scrutiny. *Id.* Justice Douglas, joined by Justices Black and Clark, dissented on the ground that the agreement was a multi-employer bargaining agreement to impose marketing hours on Jewel Tea through the threat of strike, a conspiracy based on *Allen Bradley*. *Id.* at 735-36.

50. *Id.* at 690.

D. The Judicially Created Exemption

In 1975, the Court decided *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*.⁵¹ The Court held that a union is protected by the *Hutcheson* statutory immunity when it acts in its own self-interest and not in combination with other non-labor groups.⁵²

E. Conclusion

It took a century for the courts and congress to reach a compromise on antitrust exemptions. Congress passed three acts, the Clayton Act, the Norris-LaGuardia Act, and the NLRA. Courts eventually allowed unions protection from antitrust law for unilateral action and formed the judicial, or non-statutory exemption, protecting the right to collectively bargain over wages and terms and conditions of employment.

III. PHYSICIANS

Physicians, in the past, worked under fee-for-service arrangements controlling their fees in every manner. When Americans demanded lower fees, managed care responded. MCOs have since become the bane of physicians' lives. Because physicians are considered independent contractors, they cannot bargain collectively with MCOs. Physicians believe that MCOs have taken control of their patient practice and their pocketbooks. Accordingly, the American Medical Association (AMA) and physicians have adamantly supported the Health Care Act. However, some groups vehemently oppose the Health Care Act's promulgation.

A. History

Before managed care became popular in the 1980s, physicians operated on a fee-for-service arrangement.⁵³ During the 1960s and

51. 421 U.S. 616 (1975).

52. *Id.* at 622.

53. See *The Quality Health Care Coalition Act: Hearings on H.R. 1304 Before the House*

1970s, the rate of inflation for health care severely outpaced the general inflation rate.⁵⁴ Thousands of Americans were uninsured.⁵⁵ When MCOs entered the market in the 1980s, the rate of inflation for health care costs dropped dramatically.⁵⁶ Physicians are among the highest paid professionals, and over the last decade, their incomes increased seventy-seven percent to a median net income of \$166,000 in 1996.⁵⁷

B. Physician as Independent Contractors

Under the “right to control test,” a worker is an independent contractor if the worker has control over the services performed.⁵⁸

Comm. on the Judiciary, 106th Cong. 124 (1999) (statement of Donald A. Young, M.D., Chief Operating Officer and Medical Director of the HIAA). Under this arrangement, physicians were paid for the services they rendered to patients. *Id.* The more services they provided, the more they were paid. *Id.* Arguably, the impact on patients’ pocketbooks and the quality of care were irrelevant to the doctors. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 125 (citing L. Levitt & J. Lundy, *Trends and Indicators in the Changing Health Care Marketplace*, HENRY J. KAISER FAM. FOUND. 65 (1998)). During this period, the median income of the average worker increased only 43% to a median net income of \$28,480. *See id.*

58. *See* Lutsky, *supra* note 1, at 78 (citing Gary Enters., 300 NLRB 1111 (1990)); *see also* N. Am. Van Lines v. NLRB, 869 F.2d 596 (1989); Glen Falls Newspapers, 303 NLRB 614 (1991). The NLRB provided:

The [right to control] test requires an evaluation of all the circumstances, but the extent of the actual supervision exercised by a putative employer over the means and manner of the workers’ performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees.

N. Am. Van Lines, 869 F.2d at 599. Other facts which courts consider are:

- 1) whether individuals perform functions that are an essential part of the company’s normal operation or operate an independent business;
- 2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory;
- 3) whether they do business in the Company’s name with assistance and guidance from the Company’s personnel;
- 4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company;
- 5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the Company;
- 6) whether particular skills are required for the operations subject to the contract;
- 7) whether they have a proprietary interest in the work in which they are engaged; and
- 8) whether they have the opportunity to make decisions which involve risks taken by the independent [physician] which may result in profit or loss.

The traditional approach is to classify physicians as independent contractors.⁵⁹ As independent contractors, they are prohibited from collective bargaining regarding fees and working conditions since they are not employees.⁶⁰ For physicians to collaborate and

Gary Enters., 300 NLRB at 1119. The facts of each case “must be individually considered, so physicians do not pass or fail as a group.” *Capitol Parcel Delivery Co.*, 256 NLRB 302, 303 (1981).

59. See *Lutsky*, *supra* note 1, at 67. However, physicians argue that the relationship they have with MCOs is one that makes the physician an employee. The physicians work for only one employer, the physicians collect a salary and bonuses tied to performance, and physicians’ terms of employment are dictated by the MCOs and are not negotiated. *Id.* at 64. A recent judicial decision found this argument convincing. See *NLRB v. Thomas-Davis Medical Ctrs.*, P.C., 324 NLRB 15 (1997) (independent physicians considered employees when the physicians’ practices were under the complete control and discretion of the MCO); see also *NLRB v. Health Care and Retirement Corp. of Am.*, 511 U.S. 571 (1994) (dissent arguing that acting in a supervisory capacity by directing other employees did not make physicians supervisors in a traditional sense since they did not have the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees”); *NLRB v. Amerihealth, Inc.*, 326 NLRB No. 55 (1998) (allowing hearing for determination of whether physicians were controlled so much by an HMO that they were considered employees). But see *AMA House of Delegates Report 41 of the Board of Trustees (A-97)*, *Physicians and Unions*, at 4 (“Before physicians can engage in collective bargaining under the labor exemption, the bargaining process must be part of a labor dispute. For there to be a labor dispute, the collective bargaining must concern the terms and conditions of employment.”). Traditionally, there is “no labor dispute for the purposes of the labor exemption if the physicians are independent contractors, entrepreneurs, or independent businesses.” *Id.*

60. See *Lutsky*, *supra* note 1, at 67. Only when physicians are deemed to be employees in an “employment relationship” involved in a genuine “labor dispute” will they be able to collectively bargain with employers. Traditionally, there has been “no labor dispute for purposes of the labor exemption if the physicians are independent contractors, entrepreneurs, or independent businesses.” *Id.* (citing *AMA House of Delegates Report 41 of Trustees (A-97)*, *Physicians and Unions*, *supra* note 59, at 6). The exception to the traditional approach is that there are physicians who fall under the classification of employees: those physicians who are actual employees of a hospital. *Id.*; see also *Serbaroli*, *supra* note 4 (explaining that salaried doctors at public hospitals are generally recognized as employees). There is a debate over whether interns and residents are considered employees or students. *Lutsky*, *supra* note 1, at 73. As employees, they can take advantage of the antitrust exemption; as students they cannot take advantage of the exemption. *Id.*; see also *NLRB v. Cedars Sinai Med. Ctrs. and Cedars-Sinai House Staff Ass’n*, 223 NLRB 251 (1976) (“interns, residents and clinical fellows, although they possess certain employee characteristics, are primarily students We conclude that [they] are not ‘employees’ within the meaning of Section 2(3) of the [NLRA]”); see, e.g., *NLRB v. Univ. of Chicago Hosps. and Clinics*, 223 NLRB 1002 (1976); *NLRB v. Kansas City Gen. Hosp.*, 225 NLRB 106 (1976). Recently, interns and residents successfully attacked the *Cedars-Sinai* decision. *NLRB v. Boston Med. Ctr.*, 330 NLRB No. 30 (1999). The NLRB held that while interns, residents, and fellows are students, they are also employees under the NLRA. *Id.* at 26.

collectively bargain to set prices is a per se violation of the Sherman Act.⁶¹

C. Physician Complaints

Self-employed physicians currently subject to antitrust laws have two main concerns. First, physicians feel they have no control over patient care decisions.⁶² MCOs use a variety of methods to control the practice of physicians.⁶³ Among these methods are: contractual measures designed to tie physician compensation to cost control measures; “gag clauses,” which restrict communication between the physician and patient on specified subjects; and “termination without cause” provisions, which allow the MCO to remove the physician from the plan.⁶⁴ Physicians believe these contract provisions weaken the quality of care they may give patients.⁶⁵ While physicians detest these provisions and the affect on their practices, physicians believe it is impossible to alter the provisions because MCOs often refuse to negotiate over the provisions and physicians do not have the economic leverage to force negotiations.⁶⁶

Physicians’ second concern is decreasing practice revenues as a result of managed care.⁶⁷ Physicians blame low fees, refusal by MCOs to cover tests and procedures, and cost control measures for the decrease in practice revenues.⁶⁸

Increasingly, physicians are turning to unions to solve these problems.⁶⁹ A union can act as a personal advocate, give advice to

61. NLRB v. Boston Med. Ctr., 330 NLRB No. 30 (1999).

62. Lutsky, *supra* note 1, at 87-88.

63. Deis, *supra* note 26, at 955.

64. *Id.*; see also Jennifer L. D’Isidori, Note, *Stop Gagging Physicians!*, 7 HEALTH MATRIX 187, 194-95 (1997) (providing the purpose of gag clauses).

65. See Deis, *supra* note 26, at 956; see also Ellen L. Luepke, *White Coat, Blue Collar: Physician Unionization and Managed Care*, 8 ANN. HEALTH L. 275, 277 (1999) (noting that radical physicians believe that MCOs have “taken over health care, destroyed the physician-patient relationship and decreased quality of care, all for the purpose of realizing corporate profits”).

66. Deis, *supra* note 26, at 956.

67. Lutsky, *supra* note 1, at 87-88.

68. *Id.* at 87 (quoting Dr. Joseph Murphy, “[MCOs] are both negatively affecting the lifestyles of physicians and the quality of patient care Our input, prestige, and power within the health-care system continue to dwindle relentlessly”).

69. *IPA Messenger Models’ Cause Concern, AMA Says*, 158 Lab. Rel. Rep. (BNA) 376,

independent physicians on how to negotiate with providers, and assist in collection of reimbursements for work performed in good faith, but for which the insurance provider refuses to pay.⁷⁰

Physicians, however, may use alternatives to unions. One option is a “messenger model” where groups of independent physicians and hospitals form networks to negotiate with MCOs through third party messengers, often union representatives.⁷¹ Another option is

376-77 (1998). Of the roughly 756,710 practicing doctors in the United States about 42,000 are currently members of labor unions and if the current restrictions on physicians are lifted, “a ‘stampede’ of self-employed physicians in independent practice will rush to organize themselves in labor unions.” *Id.* at 376. However, physician unionization has been around for decades. It was at its peak in 1974 when over 55,000 physicians joined unions as a defense to malpractice, heavy government regulation, and a national health insurance plan. *See* Robert L. Lowes, *Strength in Numbers: Could Doctor Unions Really Be the Answer?*, MED. ECON. 114, 114 (1998). When the Supreme Court declared that physician unions were subject to the Sherman Act, numerous suits were filed against the unions. *See, e.g.,* Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) (holding tying arrangement is unlawful); Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982) (maximum fee agreements agreed upon by medical foundation members were per se unlawful); Wilk v. Am. Med. Ass’n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

70. Lutsky, *supra* note 1, at 98.

71. *See id.* at 85. These messengers generally have better negotiation skills than physicians, but must be careful not to cross into illegality. The messengers may not share information between the individual physicians, but physicians benefit by the “strength in numbers” arrangement. *Id.* The messenger is also limited in the activities he may perform for the physician group. He may not make a decision for a physician or threaten a group boycott. *Id.* The network of independent physicians and hospitals must have “significant financial or clinical integration . . . if doctors are just trying to keep prices up and control the market, that’s illegal.” Harris Meyer, *Look for the Union Label; Private Practice Physicians Considering Unionizing*, HOSP. & HEALTH NETWORKS, Dec. 5, 1996, at 69 (quoting Mark Whitener, deputy director of the FTC’s Bureau of Competition). Recently, the FTC took a strong stance on the line crossing attempts of unions in third party messenger models. The FTC brought two actions based on Sherman Act violations. In *United States v. Federation of Physicians and Dentists, Inc.*, 63 F. Supp.2d 475 (1999) and in *United States v. Federation of Certified Surgeons and Specialists, Inc.*, 64 FR 5831-02 (1999), the FTC alleges price fixing despite the alleged use of the messenger model. *Federation of Physicians and Dentists* has not yet been resolved, however, the Federation of Certified Surgeons and Specialists agreed to a consent order that enjoined the union from collectively negotiating or acting as, or using, a messenger or agent with any payer on behalf of any Federation Physician that would enhance their bargaining power. The union may, however, communicate factual, accurate, and objective information about a proposed contract offer or terms. So far, the popularity of the messenger model is unclear. Although unions are pitching themselves as messengers and advocates by helping collect fees from third party payers, by opposing unwanted actions by state medical boards, and by lobbying against legislation harmful to doctors, the membership in at least one of these unions remained the same from 1995 to 1998. *See* Lowes, *supra* note 69, at 116. The president of the Federation of Certified Surgeons and Specialists, Joseph Diaco, M.D., believes that messenger models are not popular with physicians because the Department of Justice does not

integration, where physicians merge into groups that share significant financial risk.⁷²

D. The American Medical Association View

The AMA believes that the Health Care Act is the solution to the physicians complaints because it will provide the physicians with greater leverage in negotiations with MCOs. The AMA asserts that health plan providers have too much leverage, while physicians have too little, and that the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have poor records of regulating health plan activity while restrictively enforcing antitrust policies against physicians.⁷³

E. Opponents of the Health Care Act and Other Obstacles

The FTC, however, vehemently opposes the Health Care Act because of the possibility of abuse and increased costs to consumers and the government. The FTC also notes that the labor exemption

allow physicians to discuss fees under the model. Molly Tschida, *Killing the Messenger: Use of Third Parties in Negotiating Managed-Care Pacts under Fire*, MOD. PHYSICIAN 2 (1999). He says, “[W]hy would you want a messenger system if you can’t discuss fees?” *Id.*

72. Federal law allows independent physicians to bargain collectively with MCOs if they share significant financial risk or seriously integrate their practices. *See* Lowes, *supra* note 69, at 116; *see also* JOHN J. FLYNN & HARRY FIRST, ANTITRUST STATUTES, TREATIES, REGULATIONS, GUIDELINES, POLICIES 408-28 (1999). Generally, the DOJ and FTC will not challenge non-exclusive joint ventures where the participants share substantial financial risk and constitute less than thirty percent of physicians in a specialty with active hospital staff privileges that practice in the relevant geographic market. *Id.* at 408. An exclusive physician joint venture may constitute only twenty percent of physicians in a specialty that practice in the relevant geographic market with active hospital staff privileges. *Id.* Exclusiveness is defined by the participants’ activities, not by the contractual relationship. *Id.* at 408. There are numerous indicia of non-exclusivity. *See id.* at 409.

73. In testimony to Congress in support of the Health Care Act, the AMA pointed out that the eighteen largest plan providers merged into only six. *The Quality Health Care Coalition Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of E. Ratcliffe Anderson, Jr., M.D., Executive Vice President and Chief Executive Officer, AMA). Because of this increase in market concentration, neither patients nor physicians have any choice in plan providers. *Id.* In order to keep patients, physicians cannot afford to refuse to contract with plan providers. *Id.* The AMA alleges that federal agencies have “rarely, if ever, challenged an HMO merger,” but have aggressively pursued physicians and other providers under antitrust laws. *Id.* Further, contract terms provided by plan providers are often egregious and non-negotiable. *Id.*

already provides a remedy to physician employees, and this exemption was never intended to remedy the problems of which physicians complain.⁷⁴

The DOJ similarly opposes the Health Care Act as it would authorize nonemployees to negotiate collectively with MCOs over fees and to refuse to deal with plans refusing their demands.⁷⁵ Further, the DOJ sees no reason to differentiate doctors from other professionals who are unable to bargain collectively under current antitrust laws.⁷⁶ Replying to the AMA's attack on the lack of response by the DOJ regarding MCO activity, the DOJ discussed its close scrutiny of mergers and other activities by MCOs.⁷⁷ Finally, the

74. Physicians have, in the past, collaborated to fix prices and to create more favorable reimbursement terms from third party payers in an unfair manner. *The Quality Health Care Coalition Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Robert Pitofsky, Chairman, FTC). Under the Health Care Act, it would be legal for these practices to continue and any "health care professional" could join in, including pharmacists. *Id.* It is not a remote possibility that a group of physicians would collaborate to demand an increase in fees while refusing to contract with any insurer who refuses to pay the rates. *Id.*; see also *supra* note 70 and accompanying text.

The result of the Health Care Act would be higher prescription rates, insurance premiums, and out of pocket expenses with a reduction in benefits for consumers. See *id.* The government may be forced to decrease services under Medicare and Medicaid or raise budgets to maintain current levels. See *id.*

The labor exemption was never intended to promote the quality of patient care as the proponents suggest the Health Care Act will do. See *id.* There are also alternatives to the Health Care Act, including the current ability of individual physicians to negotiate with plan providers and the ability of physicians to collectively confront the insurance providers about policies and present evidence to support their views. See *id.*

75. *The Quality Health Care Coalition Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice).

76. *Id.* Mr. Klein admonishes:

There is no justification to accord special status to health care professionals under the antitrust laws, differentiating them from other professionals and independent contractors such as architects, engineers, or lawyers. It would be both unwise and harmful to consumers to grant [doctors] a special exemption.

Id.

77. Klein discussed activities by Aetna and Prudential that scrutinized and found to be against antitrust laws without significant divestitures by Prudential. Once the necessary changes were made, and only once those changes were made did the DOJ approve the merger. *Id.* He also discussed the attempts by independent physicians to take joint action in order to increase their fees at the expense of the consumer. *Id.* (discussing *Federation of Certified Surgeons and Specialists*, 64 FR 5831 (1999), and *Federation of Physicians and Dentists*, 63 F. Supp.2d 475 (1999)).

DOJ, like other opponents, believes the Health Care Act would significantly increase costs to consumers.⁷⁸

The Health Insurance Association of America (HIAA) also proclaimed its opposition to the Health Care Act in the hearing before the House Judiciary Committee.⁷⁹ Citing as reasons, the ability of MCOs to reduce prices for consumers, the motive of physicians to increase their income, the past abuses of physicians, the danger of increased costs to consumers, the inapplicability of labor laws to physicians, and the current ability of physicians to bargain or discuss important matters with MCOs, the HIAA concluded that the Health Care Act is a problematic proposal with the potential to devastate the nation's health care system.⁸⁰

78. In *Federation of Certified Surgeons and Specialists*, Klein submitted that the competing physicians had successfully raised their fees by twenty to thirty percent before the DOJ began investigating. *Fed'n of Certified Surgeons and Specialists*, 64 FR 5831. Klein warned that the realities of economics and business suggest that, contrary to a proposition by Campbell, MCOs would not absorb these costs, but would instead pass them on to consumers and taxpayers. *Id.*

79. *The Quality Health Care Coalition Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Donald A. Young, M.D., Chief Operating Officer and Medical Director of the Health Insurance Association of America).

80. *Id.*; see *supra* notes 53-57 and accompanying text for Mr. Young's discussion of abusive practices by physicians before MCOs reduced costs to consumers while maintaining a reasonable income for physicians. Mr. Young criticizes the motive of physicians for supporting the Health Care Act. He believes that considering the motivation of physicians to increase their profits, the concern for quality in patient care is merely a front. *Id.* He asserts that physicians do not need an exemption to collectively discuss issues regarding quality of care concerns under the FTC and DOJ guidelines. *Id.*; see also Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, Section 4, Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Providers' Collective Provision of Non-Fee-Related Information to Purchasers of Health Care Services, at 14 (1996). Further, many doctors belong to large health care groups that can exert enormous pressure on MCO's. *The Quality Health-Care Coalition Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, *supra* note 79. Young gives as examples the Hill Physicians Medical Group in California and American Oncology Resources. Hill Physicians has over 700 primary care physicians, over 1,800 specialists, and 325,000 enrollees. American Oncology Resources has over 700 physicians and over 325 oncologists in treatment centers in 24 states. *Id.*

Mr. Young was extremely concerned that, while independent physicians would enjoy an antitrust exemption, they would not be subject to the jurisdiction of the NLRB, would not be employees of a common employer, and would not be "bargaining units" as defined by federal labor law. *Id.*

An additional opponent of the Health Care Act, the Antitrust Coalition for Consumer Choice in Health Care voiced its opinion that the Health Care Act spelled disaster for American health care for the reasons set forth by other opponents. See *The Quality Health Care Coalition*

An author of a recent article suggests that giving physicians the ability to collectively bargain would not eliminate physicians' concerns.⁸¹ He notes that only items of pecuniary interest would be mandatory bargaining subjects, while those subjects with significant impact on consumers, like quality of care, would be only permissive subjects.⁸² The risk that physicians would sacrifice patient care for improved compensation or benefits would, therefore, be significant.⁸³ By comparing issues over which physicians would bargain to traditional subjects of labor bargaining, the author deduced that labor law would not help protect patients or change physicians' current situation.⁸⁴

Last year, Congress proposed two separate Patients' "Bill of Rights" Acts.⁸⁵ The bill passed by the House⁸⁶ aims to deter abuses

Act: Hearing on H.R. 1304 Before the House Comm. on the Judiciary, 106th Cong. (1999) (statement of the Antitrust Coalition for Consumer Choice in Health Care).

81. Deis, *supra* note 26, at 964. "[The NLRA imposed duty to negotiate in good faith] appears to provide no guarantee that MCO's would concede to any requests by a physician union or that any agreement would be reached." *Id.*

82. *Id.* at 965-66 (citing David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 *YALE L.J.* 689, 707 (1990)); Michael J. Stapp, *Ten Years After: A Legal Framework of Collective Bargaining in the Hospital Industry*, 2 *HOFSTRA LAB. L.J.* 63, 99-100 (1984).

83. Deis, *supra* note 26, at 988. "Assurance of quality patient care has been the battle cry of the physician-unionization movement, yet their mantra is a farce." *Id.*

84. Salary, fee-for-service arrangements, capitation systems, bonus programs, cost sharing, and deselection clauses would be mandatory subjects of bargaining. *Id.* at 968-82. Patient coverage decisions, gag clauses, utilization review processes, and efficiency standards would probably be considered non-mandatory, or permissive subjects. *Id.*

Labor law is simply not amenable to the protection of consumers' interests. The procedural requirements of collective bargaining do not require MCO's and physicians to concede to each other's demands and do not even require that the parties reach an agreement. Although the bargaining requirement would prevent MCO's from unilaterally changing a physician's compensation or from discharging the physician, MCO's would not be required to bargain over utilization review or gag clauses. Moreover, the regulatory board overseeing labor relations is relatively powerless to compel the parties to protect patients' interests. The issues of greatest concern to patients would hinge upon the economic bargaining power of their physicians union and the willingness of their physicians to risk financial well being to protect patients interests If, through a miracle of generosity, collective bargaining agreements contain terms beneficial to patients' interests, labor law provides no means for patients to enforce the terms of these agreements.

Id. at 988.

85. In the 105th Congressional session, the House passed one version of the Patients' Bill of Rights and the Senate passed a different version. *Financial Services Reform is Top Insurance*

and denials of service by MCOs and gives patients the right to sue health plans for damages caused by denials of benefits.⁸⁷ The Senate version also intends to add protections for patients in group health plans, but is perceived as a less extensive bill and rejects the right to sue provision.⁸⁸

IV. ANALYSIS OF THE HEALTH CARE ACT AND PROPOSAL

Passage of the Health Care Act would not be an effective or wise action by Congress. Not only does a labor exemption for physicians contravene the fundamental theories behind antitrust and labor law, it also does not cure physicians' complaints.

Essentially, the non-statutory labor exemption allows employees to bargain collectively with employers over pay and working conditions.⁸⁹ The purpose of the labor exemption is to ensure that employers treat workers fairly.⁹⁰ The exemption is intended to apply only to employees and employers.⁹¹ However, physicians are

Story of 1999, BESTWIRE, Dec. 27, 1999, at 1. A conference committee was appointed to reconcile the differences. Paul Bradley, *Robb Promises Stronger Pursuit of Patient Rights*, RICH. TIMES DISPATCH, Dec. 31, 1999, at B-4. It is expected that in the 106th session, the House and Senate will compromise on the Health Care Act. *See id.*

86. The Patient Protection Act of 1998, H.R. 4250, sponsored by Reps. John D. Dingell, Democrat-Michigan, Charlie Norwood, Republican-Georgia, and Greg Ganske, Republican-Iowa. H.R. 1304 was supported by numerous House Republicans despite "the opposition of the managed care industry, employer groups, and the House GOP leadership." Spencer Rich, *Dems Ready to Pounce Over Patients' Rights*, 32 No.4 NAT'L J. 242 (2000).

87. For a description of allegedly abusive practices of MCOs, see *supra* notes 65-66 and accompanying text. In addition to abusive practices directed toward physicians, individuals complained that they were denied services by MCOs that their physician felt were necessary to their health. *See generally* Bradley, *supra* note 85, at B-4 (describing patient complaints that an HMO prevented a young boy from obtaining access to a specialist to treat "persistent ear infections" that were unresponsive to antibiotics and a patient complaint that she was denied access to so-called "experimental" treatment for a rare-form of cancer).

This provision sparked a heated debate due to concerns that it will substantially raise prices for health care coverage. *Republicans Now Embrace the Patients Bill of Rights with a New Urgency* (National Public Radio broadcast, Morning Edition, Jan. 24, 2000). Summarizing the head of the American Association of Health Plans, Karen Ignagni, the Rovner reported that if more lawsuits are allowed, "costs will rise so much that employers will stop providing health coverage altogether." *Id.*

88. Rich, *supra* note 86.

89. *See supra* text accompanying note 52.

90. *See supra* text accompanying note 25; *supra* note 26 and accompanying text.

91. *See supra* note 27 and accompanying text.

inherently considered independent contractors, unless they work for a hospital.⁹²

The Health Care Act allows physicians who are not employees to collaborate and dictate pricing to insurance providers.⁹³ It does not grant a “laborer” or an “employee” the ability to improve his working condition, but allows educated, independent physicians to dictate, not fair wages, but *increased profits*.⁹⁴ Physicians already make a fair wage and their median income increased at more than twice the rate of other workers.⁹⁵

Neither the labor exemption, nor the baseball exemption adversely affects anyone outside of the employer/employee relationship. Generally, laborers produce goods that consumers may choose to purchase or refuse to purchase at their discretion. Similarly, baseball is an entertainment sport that consumers may choose to attend or refuse to attend. However, the Health Care Act and the exemption it creates could have, potentially, a great impact on the public at large. The Health Care Act creates an antitrust exemption for a product that consumers have little discretion in purchasing. All consumers confront the need for health care at some point in their lives. The Health Care Act would leave consumers with little choice when they seek care: consumers must either pay the prices dictated by the physician or risk their health by refusing to pay.

The past reluctance of both the judiciary and the legislature to grant exemptions demonstrates the hesitance to carry the antitrust exemptions too far.⁹⁶ Once a doctor is able to collectively negotiate, thereby effectively creating a monopoly in his or her market, all professionals will demand the same exemption. Lawyers could collude to raise fees for legal services. Accountants could organize to charge higher rates to businesses and individuals for accounting services. This scenario is the antipathy of the intention of Congress in creating the antitrust laws. No group should be able to collude to raise prices in the market under the antitrust laws, but the Health Care

92. See *supra* note 58 and accompanying text.

93. See *supra* notes 6, 81-84 and accompanying text.

94. See *supra* notes 81-84 and accompanying text.

95. See *supra* notes 54-57 and accompanying text.

96. See *supra* notes 10-52 and accompanying text.

Act allows just that result.

Outside the realm of the antitrust exemptions, the explanation for the popularity of managed care is that doctors were charging more than patients could afford.⁹⁷ This inability to pay resulted in a large number of Americans without physician care.⁹⁸ Doctors abused their privilege in the past and there is no indication that they will not do so now.⁹⁹ In fact, physicians admit that managed care caused a decrease in profits.¹⁰⁰ The Health Care Act will allow doctors to increase profits, thereby padding their pockets further. At an increase in median wage over thirty percent than that of the average worker, physicians are not to be pitied.¹⁰¹

Further, if physicians are to have an increase in profits, health care costs must increase as well.¹⁰² It is unrealistic to think that MCOs will not pass along any additional costs to the public.¹⁰³ If Congress passes the Health Care Act, it is likely that health care will return to the environment of the 1970s when many Americans could not afford health care.

Finally, there are alternatives to granting physicians an exemption that allow them more leverage in negotiations and still provide quality health care. First, the executive branch can more closely monitor practices of plan providers to ensure that unfair conditions are not being pushed onto doctors or unsuspecting patients.¹⁰⁴ The DOJ acknowledges this duty.¹⁰⁵

Second, although there are many independent physicians who practice in small groups, many practice in large groups.¹⁰⁶ It is absurd to presume that these physicians have no leverage over MCOs. Even physicians in small groups currently have the ability to negotiate collectively through several techniques. First, physicians can work

97. *See supra* notes 53-57 and accompanying text.

98. *See supra* note 55 and accompanying text.

99. *See supra* notes 53-57 and accompanying text.

100. *See supra* note 67 and accompanying text.

101. *See supra* note 57 and accompanying text.

102. *See supra* notes 74, 78, 80 and accompanying text.

103. *See supra* note 78 and accompanying text.

104. *See supra* note 74 and accompanying text.

105. *See supra* note 77 and accompanying text.

106. *See supra* note 80 and accompanying text.

for hospitals, thereby becoming employees.¹⁰⁷ Second, physicians can form joint ventures.¹⁰⁸ Doctors in joint ventures can negotiate together against the MCOs. Third, in what is known as the “messenger model,” a group of physicians may share risk and form networks with a third party “messenger” to negotiate with the insurer.¹⁰⁹ These three methods each allow physicians greater leverage in negotiations with insurance providers.

If doctors are legitimately concerned with the quality of patient care, as the Health Care Act suggests, the enactment of a Patient Bill of Rights remedies this concern by giving patients the ability to demand certain options from the MCOs and making patient care a choice of the patient and the doctor.¹¹⁰ The Patient Bill of Rights is a proper way to eliminate the concerns that physicians claim to have over patient care without delving into an area of law that the judiciary and the legislature have been hesitant to alter.

V. CONCLUSION

It took the legislature and the judiciary a century to develop the application of antitrust laws to labor and to carve out limited exemptions from the law. As professional independent contractors, Physicians have been subject to these antitrust laws since the promulgation of the Sherman Act. Now, physicians argue that the entrance of MCOs into health care cause such burdens on physicians that they should now be afforded an antitrust exemption. Physicians, however, have numerous other methods of negotiating with MCOs. Nevertheless, an antitrust exemption would not provide the cure physicians claim to seek. While it took years to create the labor laws, it could take only the signing of the Health Care Act to unravel them.

107. *See supra* notes 25-27 and accompanying text.

108. *See supra* note 72 and accompanying text.

109. *See supra* note 71 and accompanying text.

110. *See supra* notes 85-88 and accompanying text.

