In May 2002, a group of physicians filed a class action lawsuit alleging that the National Resident Matching Program (NRMP) violates antitrust laws. The plaintiffs contend that NRMP practices have stabilized lower-than-competitive wages and imposed exhausting working conditions on residents. They also maintain that NRMP procedures virtually force applicants for house officer positions to forfeit their right to negotiate for better wages and conditions. The plaintiffs also allege that the defendants have collectively fostered anticompetitive accreditation standards through the Accreditation Council for Graduate Medical Education. Jung v Association of American Medical Colleges could present antitrust law with some difficult challenges. Although the matching program on its face appears to limit competition in a manner that previous cases have found illegal, it operates in the context of important professional activities (medical education and quality improvement) that may generate some judicial deference. At this early stage, no confident prediction can be made about the outcome of the case if it goes to trial; however, the plaintiffs appear to have a plausible case under existing antitrust doctrine, and lengthy litigation is possible. Given the important questions that the litigation will not address, such as the potential costs of a finding of illegality to the government and other payers, and the impact of such a finding on the health care system as a whole, a legislative solution seems highly desirable.

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cept—postgraduate employment/training contracts as early as their second year in medical school, even though many were not yet sure of their specialty fields of interest. All of the major organizations involved in the house officer training process—the AAMC, the ACGME, the American Medical Association, the American Board of Medical Specialties, the American Hospital Association, and the Council of Medical Specialty Societies—cooperate in managing the private, not-for-profit NRMP.

The NRMP procedures require medical school seniors applying for hospital residencies to rank-order up to 15 preferences for institutional placement in the NRMP registry after payment of a $40 registration fee. (A candidate seeking to rank more than 15 preferences can do so by paying an additional $30 for each listing.) The NRMP construes certification of registration as the candidate’s offer to work for those institutions in the order listed. Participating institutions are likewise required to rank-order their preferences for medical residents, and the NRMP determines when the outcome of these 2 sets of preferences constitutes a match.

By engaging in the NRMP process, participating hospitals and applicants must commit to accepting any match that occurs as long as they have listed one another as potential partners and a congruence of their choices results. Presumably, the parties will have discussed the general terms of any potential employment prior to listing one another as preferences, but the rules of the matching program preclude their having agreed on specific terms prior to listing. Moreover, according to the NRMP, applicants and hospitals are irrevocably bound to one another once a match results; hence, little opportunity exists to bargain over salary and conditions of employment afterward.

Although participation in the NRMP is not mandatory, more than 80% of all first-year US house officer positions are now offered exclusively through the program. That percentage will almost certainly increase beginning with the 2004 match because under a new NRMP policy all institutions wishing to participate must attempt to fill all of their residency positions through the NRMP process as of that year. This means that applicants who choose not to engage in the match (or who are excluded from it), who already have a sharply reduced number of institutional buyers for their services, will find that number decreasing even further. Nonparticipating hospitals would correspondingly have a smaller number of potential residents from whom to choose.

The terms and conditions of the Match Participation Agreement specify that although participants can “express a high degree of interest” in one another and attempt to influence each other’s ranking in their favor, “[a]ny verbal or written contract for appointment to a residency position made prior to the Match” constitutes a material breach of the NRMP agreement. The NRMP requires that all participants conform to its mandates (including its rules that participants cannot make side contracts for employment with one another—or elsewhere—and must accept all matches resulting from the NRMP process) through its policy statement. Maintaining that “[t]he success of the Match depends on a high level of trust,” the document sets forth representative circumstances constituting match violations, ranging from contracting for a residency position outside the process to applicant “no shows” or institutional defaults after a match has resulted.

The assistant director of NRMP has stated that fewer than 50 violations of the NRMP’s 20,000 matches are reported annually, and only a small percentage are subject to sanction (Waldo Wentz, written communication, January 2003). The organization has nonetheless recently announced new policies that presumably strengthen its enforcement mechanisms and enhance compliance. For example, under these new rules, applicants and programs who violate the participation agreement risk being identified on the NRMP database as “violators” and prohibited from participating in the match for up to 3 years. If an applicant or institution commits a violation before the day of the match, processing of the rank-order lists may be interrupted. If the parties agree to resolve the violation prior to the deadline for submission of rank-order lists or match day, the NRMP will work with them to take corrective action. If the violation is not resolved in a timely manner, the applicant or program may be withdrawn from the match altogether. These sanctions have extremely serious consequences for both applicants seeking residencies and institutions seeking residents.

HISTORY OF ANTITRUST LAW IN HEALTH CARE MARKETS

Over the past 20 years, antitrust law has been applied to a wide variety of collaborative activities among health care professionals. The government enforcement agencies (the Federal Trade Commission, the antitrust division of the Justice Department, and state attorneys general) have successfully challenged dozens of physician “cartels” as illegal restraints of trade. These have included collective agreements to set prices or terms of dealing with third-party payers, attempts to deter managed care plan entry into the health insurance market, and efforts to block rivalry from alternative care providers or new physician groups in the same market.

In contrast, antitrust law has proved quite solicitous to the professional judgments of physicians and their associations. Cases (almost invariably brought by private parties) challenging accreditation by medical societies and boards and questioning hospital staff privilege determinations have been almost uniformly unsuccessful. In addition, the US Supreme Court has occasionally given the signal, as it did in its most recent antitrust decision, that where market imperfections are present in a business sector such as health care, restraints of trade involv-
ing professionals might warrant somewhat greater leniency.  

**APPLICABLE LEGAL STANDARDS**

**Threshold Standard of Review**

An important threshold issue in _Jung_ will be the legal standard by which the matching program is judged. Historically, the law has distinguished between restraints of trade that obviously harm competition and lack justification, and those that offer at least plausible consumer benefits. The former are deemed per se illegal, which means that the trial court need only inquire whether the parties indeed entered into the challenged collusive behavior. In contrast, restraints that offer some promise of improving efficiency or making markets work better are examined under the rule of reason, a standard that holds the plaintiff to more exacting evidentiary requirements.

The Supreme Court's most recent statement on this matter muddied the analytical waters somewhat. It rejected the lower court's “quick look” (rather than full-blown rule of reason) determination of illegality, saying that courts should determine exactly how searching an evaluation to apply in light of the specific facts before them. This downplays the dichotomy between the per se and rule-of-reason standards of review further than the lower court had gone in its quick look. It also introduces a note of uncertainty because it endorses a more flexible sliding scale of legal analysis.

Nevertheless, once the rule of reason is invoked, plaintiffs must show that the challenged restraint causes net harm to competition. This usually requires them to demonstrate the market power and conditions making it likely that competitive rivalry has been reduced. If defendants do adduce proof of significant procompetitive benefits flowing from the restraint (eg, that sharing information about salaries improves competitive interactions), the plaintiffs must then further demonstrate that those benefits are outweighed by competitive harms. Analysis of the market that the NRMP affects is complicated by the fact that the matching program involves a simultaneous exchange of 2 distinct services. In one sense, medical residents are buyers of educational services from seller residency programs. At the same time, residents are selling their labor to the buyer hospitals that run those residency programs. The salary that hospitals pay to residents reflects the net value of this mutual exchange.

Not surprisingly, the distinction between per se and rule of reason categorization generally determines the legal outcome of a specific case. Per se classification essentially guarantees the plaintiffs victory, while, on the other hand, plaintiffs can rarely meet the stringent proof requirements to win a straight rule of reason case. As a general matter, collective action by professionals that inhibits competitive bidding has been condemned under the per se rubric without elaborate scrutiny, even when styled as adhering to ethical norms or as safeguarding the public interest. In contrast, courts almost never apply the per se standard if the restriction involves medical judgments, accreditation, or professional standards.

Another antitrust analytical framework holds that some arrangements restricting price competition may avoid per se categorization if they are ancillary (ie, subordinate) to a procompetitive agreement or understanding. In such a situation, the limitation on competition must be both reasonably necessary to accomplish those purposes and narrowly tailored so as not to limit competition unduly. Under this approach, the _Jung_ defendants would need to show that the NRMP serves an overarching procompetitive purpose, perhaps by showing that NRMP brings buyers and sellers together in a way that diminishes inefficiency and strategic behavior and improves the possibility that participants’ highest mutual preferences are satisfied. Second, and perhaps more problematic, the defendants would need to demonstrate that any limitations on price competition, such as precluding prematch negotiations about individual salary and terms of employment, are necessary to achieve the benefits of the matching program.

**Cognizable Beneficial Effects**

A second key doctrinal issue in the NRMP litigation concerns the categories of beneficial effects that could support the defendants’ case. In a landmark decision, _National Society of Professional Engineers v United States_, the Supreme Court set forth several bedrock principles that severely constrain defendants’ attempts to argue that societal benefits flowing from a professional restraint outweigh its anticompetitive propensities. In that case, professional engineers attempted to justify their trade association’s rule prohibiting competitive bidding as necessary to protect the public from shoddy designs that could ultimately prove “dangerous to public health, safety and welfare.”

The Supreme Court made it clear, however, that only the rule’s “impact on competitive conditions”—not its claimed quality or other noneconomic benefits—was relevant to evaluating the antitrust implications of restraining price competition. To accept the defendant’s justification that competition itself posed a threat to public safety or invited deception would be “nothing less than a frontal assault on the basic policy of the Sherman Act,” in the court’s view. The core principle that has emerged from this and more recent cases is that under the rule of reason, only improvements in competitive conditions will count on the defendants’ side of the ledger. (For example, the Supreme Court’s seminal opinion in _BMI v CBS_ held that the significant cost savings inherent in blanket licensing arrangements for musical compositions performed on radio and television were significant enough to create a whole new product and, thus, justified rule of reason treatment for pricing restraints.)

Thus, the central task at trial for the _Jung_ defendants will be to show how the matching program makes the market

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for residents more competitive. For example, the defendants may attempt to prove that the matching program makes the market for residents’ employment work more efficiently (ie, it entails significant cost savings or transactional efficiencies that cannot be achieved by other means). However, the law requires more than merely demonstrating some lowering of costs; defendants must also establish that savings are significant, that they outweigh any lessening of competition caused by the program, and that they cannot be achieved by less restrictive means.12

Another kind of cognizable benefit to competition might be that the matching program corrects market imperfections that otherwise impair effective operations of the residency placement market. The Supreme Court implicitly recognized this kind of relatively inchoate benefit when it recently overturned the Federal Trade Commission’s objections to an “ethical” ban on dental advertising. The court accepted the defendant’s justification for the restraint on the ground that dental patients have inherent difficulty understanding both treatment decisions and advertising claims.13 The defendants in Jung may similarly assert that without the match, the hiring process for residents would involve a variety of imperfections: limited information on both sides, the potential for opportunistic behavior, and a risk of the market unraveling as cumbersome negotiations for positions entail unworkable time constraints.14

ASSESSING ANTICOMPETITIVE IMPACT

The class action plaintiffs in this case have mounted a 3-part claim of anticompetitive harm. They allege that the sharing of salary information facilitates tacit agreements to depress salaries and that by precluding competitive bidding the matching program reduces their ability to negotiate more favorable terms of employment. The plaintiffs also claim that the accreditation process and standards impair competition by regulating the number of positions that may be offered, by preventing transfers of residents’ employment and by making NRMP participation obligatory. The 3 challenged NRMP practices, although united as a single conspiracy under the complaint, have vastly different characteristics and may warrant distinct legal analyses.

Of the plaintiffs’ 3 claims, only the one challenging the matching process itself comes close to stating a per se offense. The NRMP constraints are somewhat analogous to the Professional Engineers restriction on competitive bidding, in that they impede the normal concurrent shopping and negotiation process that enables buyers to obtain the best price in competitive markets. The engineers’ no-bidding rule forbade members from discussing prices with potential clients until after negotiations had resulted in an initial selection of an engineer. While the 2 cases are dissimilar in a number of respects, the Supreme Court admonished in Professional Engineers that although “not price fixing as such,” this kind of interference with the usual give-and-take of the marketplace warranted near-summary condemnation. One potentially important distinction between the cases, however, is that the engineers’ rule tended to increase consumers’ search costs, while the NRMP might have the effect of making important information about the parties’ preferences more readily available.

The plaintiffs’ allegations that the NRMP-facilitated exchange of salary information and related activities contribute to depressing residents’ salaries fall within the category of information-sharing arrangements, which antitrust courts usually examine under the rule of reason. Generally, the competitive risks associated with sharing pricing information are regarded as highly contextual. The law inquires into surrounding circumstances, such as whether the information was historical rather than prospective; whether it was shared with parties other than those setting the prices; the market conditions; whether the identity of individual transactions was masked; and, ultimately, whether the arrangement appeared to have any effect on price. Although a fact-intensive inquiry is usually necessary, evidence that those sharing the information actually used it to influence pricing collectively would carry decisive weight against the defendants.

The third aspect of the plaintiffs’ case—the use of the accreditation process to support the alleged wage-depressing effects of the match—falls within the category of activities warranting a presumption of legitimacy. Courts have repeatedly found that the benefits to consumers inherent in certifying the merits of complex goods or services—or, as economists would put it, “‘signaling quality’—generally outweigh potential harms to competition. Thus, the court may be most sympathetic to the defendants’ justifications raised in connection with this aspect of the NRMP case.

A key issue thus seems to be whether the court will view this case primarily in terms of the most obvious interdiction of competition, the matching process itself. In that case, the defendants would face an uphill struggle to mount convincing procompetitive justifications. However, if the court takes a broader view of the case and frames it as an inquiry into the related issues of information sharing and accreditation, the defendants may find greater receptivity to justifications premised on the reasonableness of the challenged restraints.

DEFENSE STRATEGIES TO AVOID ANTITRUST SCRUTINY

Defendants may have other legal strategies that could potentially derail the plaintiffs’ dispute. For example, the NRMP requires all participants to agree to submit their disputes to arbitration.3 If a judge construes this language to apply to the parties in Jung, the case could be sent to an arbitrator. The arbitrator’s decision could preempt the ability of the federal courts to decide the case and would likely make it impossible to maintain a class action. How-
ever, at least 1 federal appeals court has ruled that antitrust law is intended to protect consumer welfare, and in cases of unequal bargaining strength, federal antitrust law can trump contractual requirements that the parties arbitrate contract disputes.15

Another defense tactic could be to assert that the plaintiffs’ claims cannot be maintained under the federal antitrust laws because they are not directed at “commercial” activities. Although some older precedents rested on the premise that the proscriptions of the federal antitrust laws are “tailored for the business world” and not properly imposed on educational and other noncommercial activities,16,17 subsequent cases have not drawn such distinctions. Furthermore, the Supreme Court, which rejected a “learned professions” defense more than 25 years ago,18 has regularly applied antitrust laws to activities that blended professional or educational components and business matters.

RELEVANT LEGAL PRECEDENTS

The match program has already been addressed, albeit indirectly, in a fairly recent antitrust case, United States v Association of Family Practice Residency Directors (AFPRD).19 The US Justice Department alleged that the directors had conspired among themselves to curtail the practice of offering economic inducements, designed to recruit medical students and first-year residents to residency programs, by issuing Guidelines on the Ethical Recruitment of Family Practice Residents. The Justice Department viewed this as per se unlawful and ultimately entered into a consent decree that barred the AFPRD from implementing ethical restraints that prohibited or hindered participating programs from competing for each other’s residents.

Because the case was settled by a consent decree, no binding legal precedent was established. However, it is noteworthy and, indeed, a bit peculiar that the Department of Justice chose to challenge an agreement not to circumvent the match rather than challenging the matching program itself. The Justice Department’s decision not to bring an antitrust claim against a practice does not amount to bestowing its imprimatur of legality on it. Nonetheless, the department’s decision to stop short of challenging the restriction suggests that it may have harbored some doubts about the wisdom or viability of such a case.

Apart from the AFPRD consent decree, United States v Brown University probably has the most intriguing relevance for the jung litigation.20 Brown University and certain other educational institutions participated for years in an Ivy Overlap Group of elite colleges and universities, formed to enable the parties to agree on the amount of financial aid its members would award to the financially needy students they admitted in common. Such students could thus decide which colleges they wished to attend without taking differences in tuition pricing into consideration.

The defendants justified this plainly anticompetitive conduct—their agreement not to compete for these students on the basis of the price of their education—on the ground that the colleges’ financial aid policies served socially desirable ends. They claimed that the joint strategy precluded expensive scholarship bidding contests, which would reduce the total number of financial assistance awards they all could make. They also maintained that their agreement fostered diversity by enabling the participating institutions to focus their aid on applicants who would be unable to attend college without monetary assistance.

Ordinarily, agreements to fix prices are considered per se illegal, but the trial court was mindful of several Supreme Court cases cautioning that antitrust cases in professional and certain other noncommercial contexts might merit special analytical treatment.21 It avoided per se condemnation and applied a “quick look” rule of reason analysis to find the defendant guilty of anticompetitive behavior.22 On appeal, the Third Circuit Court ruled that the trial court had erred in performing its truncated rule of reason analysis by refusing to consider Massachusetts Institute of Technology’s “worthy purposes” defense to the Ivy Overlap Group’s admitted collusive conduct.

Ultimately, the parties settled rather than retrying the case,23 but the Third Circuit Court’s decision has potential significance for the jung litigation. Traditional antitrust doctrine would weigh the procompetitive impact of the NRMP defendants’ challenged behavior against its anticompetitive aspects to determine whether an antitrust offense has occurred, without taking any proffered social welfare benefits of the conduct—as distinguished from its purely economic effects—into account. But the opinion in Brown contains language pointing to the special status of higher education in antitrust analysis that could be helpful to the Jung defendants. They may assert that the matching program brings order to an otherwise chaotic process, integral to medical education, that would impose overwhelming transaction costs on its participants. Another societal benefit the defendants might claim is the NRMP’s effect on keeping teaching hospitals’ costs of providing charity care low.

Citing an important Supreme Court decision, the Brown court said “[i]t may be that institutions of higher education ‒ require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.”24 The opinion concluded that the trial court should have more fully examined the defendant’s “procompetitive and noneconomic justifications”25 in a full-blown rule-of-reason analysis. Presumably, by “noneconomic,” the court was referring to the social welfare benefits the defendant asserted were advanced by the overlap agreement.26

A court could apply that more permissive rationale to the jung litigation on the theory that residency training is more akin to education than to employment. That would enable the de-
fendants to argue a broader range of justification for the match agreement, which appears to foreclose the kinds of negotiation regarding terms of employment that characterizes most competitive labor markets. However, the NRMP may not be fully analogous to the scholarship practices of the Ivy League schools, which the Brown court found emanated from a “pure altruistic motive” and lacked any “revenue-maximizing purpose.” Indeed, case law has explicitly recognized the employment aspects of medical residencies by permitting collective bargaining under the National Labor Relations Act (the National Labor Relations Board held that housestaff are employees of the health care organizations wherein-which they work) and by taxing resident stipends as income (revenue-emanated from a “pure altruistic motive” and lacked any “revenue-maximizing purpose.”) Indeed, case law has explicitly recognized the employment aspects of medical residencies by permitting collective bargaining under the National Labor Relations Act (the National Labor Relations Board held that housestaff are employees within the meaning of the National Labor Relations Act and directed an election of all Boston Medical Center physicians, including housestaff) and by taxing resident stipends as income (repeating attempts by interns to exclude their stipends from federal income taxation, courts have indicated that they were employees, not students.) Moreover, the Brown decision is controversial within the antitrust community, and some observers view it as a departure from the Professional Engineers principle that noncompetitive justifications cannot save an anticompetitive restraints. Conclusion

Jung is the kind of case that presents antitrust law with some of its most difficult challenges. The matching program appears on its face to limit competition in a manner that previous cases have found illegal; nevertheless, it operates in the context of important professional activities such as medical education and quality improvement. Assuming that the court does not find the NRMP process per se objectionable, legal precedent asks judges to weigh the program’s competition-reducing aspects against possible offset-setting benefits—that those improve market performance. Yet, at the same time, traditional antitrust law demands that courts refrain from invoking broad social or policy objectives to reach a conclusion of legality.

In this case, the legal horizon is further clouded by the likelihood that, assuming the case is not settled by arbitration, a jury will be asked to sort out some of these thorny issues. If successful in convincing a jury (and any court on appeal) of the merits of their claim, the plaintiffs could win triple damages—a potentially huge award of 3 times the lost wages of a class of potentially thousands of residents. They could also recover attorneys’ fees and gain a court order to cease many of the practices that are at the heart of the matching program.

Given the complexity of the issues involved and the important questions that the antitrust litigation will not address, such as the potential costs of a finding of illegality to the government and other payers, and the impact of such a finding on the health care system as a whole, a legislative solution seems highly desirable. But absent congressional action to exempt the matching program from federal antitrust scrutiny, courts will and should apply antitrust law as they do to other important sectors of the economy. Otherwise, this difficult case could make bad antitrust law.

Disclaimer: The views expressed in this article are solely those of the authors and do not necessarily reflect those of St. Louis University. Neither Professor Miller nor Professor Greaney are involved in Jung v Association of American Medical Colleges, nor have they consulted with any involved parties in the writing of this article.

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