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Antitrust Section
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Re: Proposed Regulation #59-10: Unfair Market Trade Practices

To the Office of Attorney General:

On behalf of the Pennsylvania Medical Society (PAMED), I want to thank the Office of Attorney General (OAG) for the opportunity to comment on OAG's proposed regulation related to unfair market trade practices under 37 Pa. Code Ch. 311.

In 1990, the Pennsylvania Superior Court held that the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL" or "Act") does not apply to physicians providing medical services. *Gatten v. Merzi*, 579 A.2d 974, 976 (Pa. Super. 1990), *appeal denied* 596 A.2d 157 (Pa. 1991). The holding in *Gatten* was adopted by the Pennsylvania Supreme Court in *Foflygen v. R. Zemel, M.D.*, 615 A.2d 1345, 1354 (Pa. 1992). The Pennsylvania Superior Court and Commonwealth Court extended the protection to hospitals and nursing homes. *Walter v. Magee-Womens Hospital of UPMC Health System*, 876 A.2d 400 (Pa. Super. 2005) (Pennsylvania's UTPCPL did not apply where plaintiffs alleged that defendant-hospital misrepresented that a physician had read pap smear results – because the UTPCPL does not apply to providers of medical services); *Commw. v. Golden Gate National Senior Care, LLC*, 158 A.3d 203, 214-215 (Pa. Commw. Ct. 2017) (the non-medical services of a nursing home are subject to the UTPCPL).[1] See also

[1] But see, *Chalfin v. Beverly Enterprises, Inc.* 741 F.Supp. 1162, 1175-76 (E.D.Pa. 1989), where the U.S. District Court for the Eastern District of Pennsylvania held the UTPCPL applicable to a corporate nursing home where the nursing home allegedly discharged patients that applied for Medical Assistance in violation of the admission agreement; and held that nursing home medical services fall within "trade and commerce" and therefore subject to the UTPCPL). Of course, the Pennsylvania state court interpretations of the UTPCPL prevail over the U.S. district court interpretation. See *Commw. v. Golden Gate National Senior Care, LLC*, 158 A.3d 203, 214-215 (Pa. Commw. Ct. 2017) (the non-medical services of a nursing home are subject to the UTPCPL). *Chalfin* pre-dates *Gatten*, *Foflygen*, and *Golden Gate National Senior*

Alejandro v. Phila. Vision Ctr., 2018 U.S. Dist. LEXIS 146646 (E.D.Pa. Aug. 29, 2018) (conducting an eye exam and writing a prescription is the rendering of a medical service and the UTPCPL does not apply).

Concomitant with these holdings, the courts have noted that the legislature did not intend for the UTPCPL to disturb the existing common and statutory law regarding when liability for the rendition of medical services attaches to a physician. *Gatten, Id.* at 976; *Folfygen, Id.* at 1354. In these cases, the courts astutely observed that there is no indication that the Act was intended to create a cause of action for every statement made by a physician regarding a patient's condition, the likelihood for success of a given procedure, or the recommended course of treatment. *Id.*

Additionally, in *Gatten*, the Superior Court held that "[a]ccording to the Act, unfair methods of competition and deceptive practices in the conduct of any trade or commerce are unlawful. 73 P.S. § 201–3. The phrase "trade or commerce" includes the sale of services. 73 P.S. § 201–2(3). Among the practices condemned by the Act are various misrepresentations as well as other fraudulent conduct that creates a likelihood of confusion or misunderstanding. 73 P.S. § 201–2(4). However, even though the Act does not exclude services performed by physicians, it is clear that the Act is intended to prohibit unlawful practices relating to trade or commerce and of the type associated with business enterprises." *Gatten*, 579 A.2d at 976.

Further, in the preamble to the proposed regulation, OAG states that "[f]or purposes of regulatory intent, an agreement among two or more persons to engage in collective bargaining does not come within the scope of this proposed rulemaking."[2] In the traditional sense, collective bargaining refers to management-union negotiations that lead to a collective bargaining agreement. As such, organized labor was granted an exemption from antitrust scrutiny under the Clayton Act of 1914.

Moreover, in the Preamble's section "Policy and Determination,"[3] OAG states the following:

> *The OAG has long taken the policy position that unfair market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act in line with federal jurisprudence interpreting Section 5 of the Federal Trade Commission Act (FTCA) (15 U.S.C.A. § 45). During and following a public hearing on Senate Bill 848 from the 2013-2014 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments.*

PAMED believes it would be prudent for this regulation to avoid redundancies with the federal jurisprudence under the Sherman Act, Clayton Act, and other applicable federal laws and regulations. Redundancy in the healthcare antitrust field will require a health care entity (e.g., a clinically integrated network) to conduct additional legal research to assure compliance with the UTPCPL as

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Center. See also *Zaborowski v. Hospitality Care Ctr. of Hermitage, Inc.*, 60 Pa.D.&C.4th 474 (C.P. Mercer Dec. 10, 2002) (narrowing *Chalfin* to permit the UTPCPL to apply only to a nursing home's non-medical services).

[2] Proposed rulemaking, Preamble at pg. 3.

[3] Proposed rulemaking, Preamble at pg. 2.

well as overlapping federal antitrust law before the healthcare entity can prudently take steps to organize competing physicians to be able to reduce the overall costs of care and improve the quality of healthcare. Should that become necessary, the assertion in the Preamble that *"[t]his proposed rulemaking will impose no new costs on the private sector or the general public"* will not be accurate.[4] The result of this redundancy would likely increase the cost of healthcare and/or reduce the quality of healthcare available to the citizens of the Commonwealth.

Since it is the OAG's intent to codify existing Pennsylvania case law related to the UTPCPL and considering the established UTPCPL case law related to physicians and other healthcare professionals, PAMED has several questions regarding this proposed regulation. It is our hope through these questions and your responses to gain a better understanding of how this regulation will affect physicians, health care practices, and health care services in the Commonwealth:

1. What effect would this regulation have on the courts' previous decisions that the UTPCPL does not apply to providers of medical services, and specifically to medical procedures, services, treatments, and other medical care?

2. What effect would this regulation have on the courts' previous decisions that the UTPCPL does apply to non-medical services provided by healthcare providers and practitioners?

3. Is it OAG's intention to treat physician and other health care services as "business enterprises" and thus subject those services to the UTPCPL?

4. On page 6 of the proposed regulation relating to the catch-all provision, OAG states that "Neither the intention to defraud nor actual fraud must be proved; rather it need only be shown that the acts and practices are capable of harming another person in an immoral, unethical, oppressive, unscrupulous or unconscionable way." Does OAG intend this provision to serve as a per se violation in that any unintentional act, as OAG determines to be capable of harming another person, will be considered a violation under this regulation? Will there be safe harbors where unintentional conduct will not be subject to this catch-all provision?

5. How does OAG intend to define "service" as that word is used in the definition of "trade and commerce," particularly given the applicable caselaw as it relates to services provided by physicians and other healthcare practitioners and providers, include non-healthcare services?

6. How does OAG intend to define the phrase "collective bargaining" as discussed in the Preamble? If OAG intends to define this phrase beyond traditional management-union negotiations, what circumstances will this proposed exception to the UTPCPL apply?

7. How will OAG avoid redundancy with federal jurisprudence under applicable federal antitrust laws and regulations? Will OAG revise the proposed regulation to provide that nothing in OAG's regulation will be interpreted or enforced in any way that contradicts federal jurisprudence regarding antitrust laws and regulations in the healthcare field?

8. What effect, if any, will this regulation have on the Pennsylvania Unfair Insurance Practices Act (40 P.S. § 1171.1, et seq.)? Is this regulation in any way meant to serve as a concurrent means

[4] Proposed rulemaking, Preamble at pg. 11.

of regulation regarding unfair insurance practices in coordination with the Pennsylvania Insurance Department?

9. What effect, if any, would this regulation have on the state Supreme Court's decision that the UTPCPL does not apply to attorney misconduct? Is it OAG's intention to attempt to apply the UTPCPL to alleged attorney misconduct?

We appreciate the opportunity to comment on OAG's proposed regulation and we look forward to your responses.

Sincerely,

Marty Raniowski, MA
Executive Vice President

cc: *via email*
Independent Regulatory Review Commission (irrc@irrc.state.pa.us)