U.S. Supreme Court case could limit physician referral power

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Editor's note: *In a 5–4 decision issued June 25, the U.S. Supreme Court ruled that the plaintiffs, which included Ohio and 10 other states, had "not carried out their burden to show anticompetitive effects" of the American Express credit card company's anti-steering contract provisions.*

A case before the U.S. Supreme Court on how antitrust laws are enforced has the potential to affect health care in a way that would harm patient care and interfere with a physician's duty to a patient to provide the best medical care.

The case before the nation's highest court, *State of Ohio et al. v. American Express Company et al.*, involves how a credit card company operates, although this may seem far removed from the practice of medicine, the underlying issue the justices are considering is how federal antitrust laws are applied. Their ruling could upend how the courts determine whether anti-steering provisions are violated under the Sherman Act.

If the nation's highest court upholds a ruling by the 2nd U.S. Circuit Court of Appeals, it would mean dominant health insurers or dominant hospital systems could create contracts that include anti-referral rules that prohibit physicians from referring patients to out-of-network specialists for innovative or medically-necessary tests that would provide the patient with the best care. So argues an amicus brief the Litigation Center for the American Medical Association and State Medical Societies and the Ohio State Medical Association filed with the U.S. Supreme Court.

"Material interference with physicians' medical judgments threatens physician autonomy, damages the doctor-patient relationship, decreases medical innovation and lowers the overall quality of patient care," the Litigation Center brief states. "The antitrust laws have historically played an instrumental role in preventing such outcomes. This court should ensure that antitrust law's vital role in health care continues."

Why the ruling would impact medicine

Under the 2nd Circuit's decision, it would be extremely difficult for a patient or physician to prove to a court that antitrust laws were being violated.

A plaintiff—whether that is the government, physician or a patient—would have to net out the harm to one group of consumers with the potential benefits to another group. For example, if a physician were barred from referring a patient to a particular specialist or if a patient were unable to obtain a particular test, the court would balance that harm against the speculative benefits to other patients and insurance subscribers, the amicus brief tells the court.

If the Supreme Court allows the lower-court decision to stand, "it would provide greater leeway for dominant entities to impose contractual restraints on a physician's ability to refer their patients for care which the physician deems best in their medical judgment," the brief states.

"Physicians will have no choice but to accept those restrains because rejecting them means turning away a large number of patients whom physicians would otherwise be able to serve, which is untenable from both a business and ethical standpoint," the brief says. "Physicians would then have to weigh, against what they deem best for their patients, the consequences of their breaching their contractual obligations. It would be difficult for them to find recourse under the antitrust laws in such situations."

Physicians would be prevented from making referrals based on their best judgment and on best medical outcomes for their patients, the Litigation Center and OSMA conclude. "In this way, these restrictions could be wholly at odds with the physician's ethical responsibilities. And because such restrictions could limit quality and choice, they raise competitive concerns that the antitrust laws traditionally have proscribed," they told the Supreme Court in their brief.

Justices heard oral arguments in February and a ruling is expected by the end of June.