2004

Time to Enter A "Do Not Resuscitate" Order on the National Resident Matching Program's Chart

Gregory Dolin
University of Baltimore School of Law, gdolin@ubalt.edu

Time to Enter a "Do Not Resuscitate" Order on the National Resident Matching Program's Chart

Gregory Dolin*

> Underlying most arguments against the free market is a lack of belief in freedom itself.[1]

I. Introduction

On May 7, 2002, three physicians filed a class action lawsuit

* B.A. *with Honors*, The Johns Hopkins University 1998; J.D., *cum laude*, Georgetown University Law Center 2004; M.D., *with Recognition in Humanities*, State University of New York at Stonybrook candidate 2005. I would like to thank my parents and siblings for their constant and unending love and support. I also would like to thank Anna for putting up with me and being there for me whenever I needed her. A special thanks goes out to Professor Salop and Dean Williams for their helpful guidance and comments in preparing this Article. I am indebted to my friends in the AMA who argued with me on many occasions, and whose arguments to the contrary made this Article stronger. Finally, a special thanks goes out to my good friend Mike Heinz for taking the time out of his very busy schedule to help check the spelling and grammar in what otherwise would have been a much less comprehensible work.

[1] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (1962).

that shook American organized medicine to the core.[2] The plaintiffs attacked a veritable institution that has been in place for over fifty years and which almost every single U.S. medical school graduate during this time has used to obtain placement in a graduate medical training program, or a residency. The subject of the lawsuit's attack was the National Resident Matching Program ("NRMP"), also known as the "Match." The plaintiffs claimed that the NRMP together with accrediting organizations form a giant conspiracy designed to depress wages of individuals employed by residencies.[3] The plaintiffs alleged that the fact that an average salary of a resident hovers around $40,000, irrespective of the region or specialty, indirectly proves the agreement to stabilize wages.[4] The plaintiffs asked for treble damages, but most importantly, for an injunction against the future operation of the Match.[5]

The named defendants were sufficiently alarmed by the litigation and sought a legislative answer. On April 10, 2004, nearly two years after the litigation commenced, the President signed into law the Pension Funding Equity Act of 2004,[6] which provided the NRMP and the institutions participating in the Match with a blanket antitrust exemption except as to direct price fixing.[7] In this Act, Congress made findings that the Match is a "highly efficient, pro-competitive" process.[8] The District Court, relying on this statute, subsequently dismissed the suit.[9]

This article focuses on the NRMP system and argues that the process is neither efficient nor pro-competitive. This article argues that Congress erred in bestowing an antitrust exemption on the NRMP and the participating institutions.

This article suggests that although the system may have been necessary to check the problem of early recruiting that was

---

[2] Jung v. AAMC, No. CIV.A.02-0873 PLF, 2004 WL 1803198 (D.D.C. Aug. 12, 2004).

[3] Jung v. AAMC, *Plaintiffs' Class Action Complaint* at 5-6, *available at* http://www.savethematch.org/pdf/complaint.pdf (last visited Sept. 13, 2004) [hereinafter *Plaintiff's Class Action* complaint].

[4] *Id.* at 30-31.

[5] *Id.* at 33-34.

[6] Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004) [hereinafter Pension Funding Equity Act].

[7] *Id.* § 207(b)(2)-(3).

[8] *Id.* § 207(a)(1)(E).

[9] *See supra* note 2, at 29.

pervasive in the 1950s (similar to the one that plagued the federal judiciary until just two years ago), the system has outlived its usefulness. Part II will explain the Match's history and function and will discuss how the system makes participation in the Match inevitable and required. Part III will focus on the economic analysis of the system. It will argue that the Match abolishes the students' ability to bargain by preventing students from receiving several offers of employment. This section will explain that although the student participating in the Match may receive his most preferred choice, his lack of ability to negotiate salary and benefits precludes him from making a proper judgment as to which choice he truly most prefers. Part III will also analyze the procompetitive justifications put forth by the Match proponents and will conclude that these stated benefits are ephemeral.

Part IV will focus on the analysis of relevant case law. The caselaw is useful to this analysis, even though it is moot in light of the Pension Funding Equity Act of 2004, as it suggests that the NRMP's conduct has been viewed as anticompetitive for quite some time, notwithstanding congressional findings. In the next part, the article examines several alternatives to the NRMP and concludes that a free market system, limited only by defined dates of entry and exit from the market, is the appropriate mechanism by which medical students should select their residencies. This part argues that other systems, such as allowing students to match into multiple places only alleviate, but do not solve, the problem raised by Part III. Further, Part V argues that any system other than the free market will wreak havoc on the residency programs by potentially causing them to over- or under-enroll residents. The article's conclusion is in Part VI.

II. History and Operation of the NRMP

A graduate of a United States medical school obtains his Doctor of Medicine (M.D.) degree upon completion of the requisite curriculum of study at that school.[10] The M.D. degree in

[10] *See, e.g.*, STATE UNIV. OF N.Y. AT STONY BROOK, SCH. OF MED., *Policies & Procedures Manual, available at* http://www.hsc.stonybrook.edu/som/policy2/index.cfm (last visited May 4, 2004) (listing degree requirements including four years of study and passage of USMLE Steps 1 & 2 (licensing exams)); STANFORD UNIV., SCH. OF MED., *Requirements for Graduation, available at* http://med.stanford.edu/md/curriculum/requirements.html (last visited May 4, 2004) (same); BAYLOR COLL. OF MED., *Requirements*

and of itself, however, does not permit its holder to practice the art of medicine. In all fifty states and the District of Columbia, the holder of the M.D. degree is required to pass several licensing exams and complete from one to three years of post-graduate medical studies.[11] These studies are commonly known as an internship or a residency. During the course of these post-graduate studies a physician acquires his specialty.

A. The History of the Match

Internships were introduced to American medical education at the turn of the 20th century.[12] Internships provided an opportunity for interns to finally train in clinical medicine after four years of theoretical practice and observation. Hospitals benefited from the cheap labor provided by the interns.[13] Both then and now, the number of residency positions exceeded the number of U.S. graduates applying for such positions.[14]

Because the supply of positions originally exceeded demand for them, hospitals utilized several mechanisms to secure top ranked students.[15] One of the means used by hospitals to recruit the most desirable applicants was to make offers to these students earlier than other hospitals.[16] Such ploys quickly resulted in the forward creep of the appointment date.[17] The situation quickly became quite absurd. Students started receiving offers during their second year of medical studies,[18] long before they had seen a patient or worked in any clinical department.[19] Al-

---

for the Degree Doctor of Medicine, available at http://www.bcm.edu/osa/handbook/doctor_degree.html (last visited May 4, 2004) (same).

[11] *See, e.g.*, CAL. CODE REGS. tit. 16, §§ 1315, 1321, 1328 (2004); 22 TEX. ADMIN. CODE § 163.2 (2004); N.Y. COMP. CODES R. & REGS. tit. 8, § 60.1 (2004).

[12] *See* Alvin Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991, 992 (1984).

[13] *Id.*

[14] At the present time, however, the overall number of applicants exceeds the number of positions. This is so because there is a large number of foreign trained physicians who are also vying for residencies. *See* NAT'L RESIDENT MATCHING PROGRAM, *Advanced Data Tables for 2004 Residency Match* at 2-3, *available at* http://www.nrmp.org/2004advdata.pdf (last visited May 5, 2004) (stating that in 2004 there were a total of 21,192 first-year positions offered through the Match and 25,246 active applicants of whom only 14,609 were U.S. medical students) (hereinafter "NRMP, *Data Tables*").

[15] Roth, *supra* note 12, at 992-93.

[16] *Id.* at 993.

[17] *Id.* at 993-94.

[18] *Id.* at 994.

[19] The medical school curriculum is subdivided into clinical and pre-clinical years.

though all the institutional participants in post-graduate medical education recognized the problem, none were able or willing to stop the forward creep.[20] The offers extended by these hospitals were often good for just a few hours.[21] As a result, students had to decide very quickly, prior to even deciding on their field of practice, whether or not to accept a given hospital's offer. Although, given the surplus of positions, a student could be assured of finding one at virtually any time, the highly coveted positions did not remain available for long, resulting in pressure to accept the first offer that the student received.[22]

Eventually, the hospitals realized that the early appointment date was impractical for both them and the students, and consequently, they set out to find a solution. In 1945, medical schools agreed to embargo all of the academic information about students until the end of the third year of studies.[23] Schools abided by this agreement and the problem of early appointments was largely resolved.[24] However, the students were still faced with the problem of "exploding" offers, *i.e.*, offers that were good only for a limited time.[25] A student who was accepted into a second or third choice hospital, but was waitlisted by a more preferred program essentially had to gamble.[26] He could either take the less preferred position and forego the chance to do residency in a more desired location or give up the less desired position in hopes to be taken off the waitlist in the hospital that he most preferred. Of course, a student could accept a less preferred position and then break the commitment, but such behavior was considered unprofessional, and therefore, not truly an option.[27]

Hospitals attempted to find several mechanisms to deal with the "optimization" problem described above. First, hospitals agreed that an offer to a student would remain open for ten

---

The first two years involve pre-clinical classroom instruction in subjects like Biochemistry, Anatomy, Pharmacology, etc. The last two years involve students spending several weeks in various hospital departments (*e.g.*, Surgery, Internal Medicine, Obstetrics, etc).

20 Roth, *supra* note 12, at 993-94.

21 *Id.* at 994-95.

22 *See id.* at 994.

23 *Id.*

24 *Id.*

25 Roth, *supra* note 12, at 994.

26 *Id.*

27 *See id.*

days.[28] This would enable a student to contact more desired programs in an attempt to secure an offer from them without the fear of losing the offer already made. Eventually, however, the hospitals attempted to shorten the period during which the offer was left open. By 1949, a twelve hour period was rejected as too long.[29] The appointment day began at 12:01 A.M., and the hospitals could demand answers within minutes.[30] A centralized matching system was implemented in order to avoid this midnight madness. Hospitals and students would still make individual contacts (*e.g.*, applications, interviews); however, hospitals would submit a list of their preferred candidates and applicants would submit a list of their preferred hospitals to the centralized agency.[31] This centralized agency would then "match" students and hospitals. This was the birth of the National Resident Matching Program.

B. The Operations of the NRMP

Over eighty percent of all first year residencies are offered through the NRMP.[32] A vast majority of graduating U.S. medical students sign up with the program.[33] The participation of either hospitals or students, however, is not completely voluntary. Hospitals are strongly encouraged to participate in the Match by the residency accrediting body, the Accreditation Commission on Graduate Medical Education ("ACGME").[34] Many medical schools require their students to sign contracts with the NRMP.[35]

---

[28] *Id.* at 994-95.

[29] *Id.* at 995.

[30] Roth, *supra* note 12, at 995.

[31] *Id.*

[32] *Plaintiffs' Class Action Complaint*, *supra* note 3, at 23.

[33] Melinda Creasman, *Resuscitating the National Resident Matching Program: Improving Medical Resident Placement through Binding Dual Matching*, 56 VAND. L. REV. 1439, 1444 (2003).

[34] *See* ACGME, *Institutional Requirements* III.A.2.b., *available at* http://www.acgme.org (last visited May 5, 2004) ("In selecting from among qualified applicants, it is *strongly suggested* that the Sponsoring Institution and *all of its ACGME-accredited programs participate in an organized matching program*, such as the National Resident Matching Program (NRMP), where such is available" (emphasis added)).

A hospital effectively cannot run a residency program without the ACGME accreditation. Without such accreditation, a hospital cannot receive federal moneys for resident training, nor can the graduates of unaccredited programs qualify for licensure in any U.S. state.

[35] *See, e.g.*, STATE UNIV. OF N.Y. AT STONY BROOK, SCH. OF MED., *The Internship Quest*, *available at* http://www.uhmc.sunysb.edu/som/academics/FourthYear/internsh.html

Even if the medical school imposes no such requirement, students who do not sign with the NRMP risk being unable to interview for employment in any residency program.

In the summer of the fourth year of medical school, students begin applying to various residency programs.[36] As mentioned previously, the vast majority of these programs participate in the NRMP.[37] The NRMP contract bars the participating programs from offering any available slots outside the Match process.[38] Thus, a student who chooses to forgo the Match also automatically forgoes any opportunity to obtain a spot in a participating program. Once a student chooses to participate in the Match, he signs an agreement with the NRMP whereby he agrees (1) to not seek positions outside of the Match process[39] and (2) to abide by the results of the Match process.[40]

At about the same time that the student signs an agreement with the NRMP, he submits applications to various hospitals.[41] These hospitals, in turn, decide whether to interview the student. After the interviews are completed, the student submits a preference-ordered list (a "rank order list" or "ROL") of hospitals to the NRMP[42] and the hospitals submit an ROL of students that they interviewed.[43] Beginning in approximately mid-February and lasting through mid-March, the NRMP utilizes a compli-

---

(last visited May 4, 2004) ("All students who expect to graduate *must* enter the Match." (emphasis added).

[36] *See id.* at Table 1, *available at* http://www.uhmc.sunysb.edu/som/academics/FourthYear/timeline.html (last visited May 5, 2004) (specifying that applications to programs are to be sent between July and August of the senior year).

[37] *See supra* note 32 and accompanying text.

[38] NAT'L RESIDENT MATCHING PROGRAM, *Match Participation Agreement for Applicants and Programs* § 6.0, *available at* http://www.nrmp.org/res_match/policies/map_main.html#match_commit (last visited May 5, 2004) ("It is a material breach of this Agreement for a participant in the Matching Program to make any verbal or written contract for appointment to a concurrent year residency position prior to the Matching Program") [hereinafter NRMP, *Agreement for Applicants & Programs*].

[39] *Id.*

[40] *Id.* § 5.1. ("The listing of an applicant by a program on its certified rank order list or of a program by an applicant on the applicant's certified rank order list establishes a binding commitment to offer or to accept an appointment if a match results . . . . Failure to honor this commitment by either party participating in a match will be a material breach of this Agreement and may result in penalties . . . .")

[41] *See Save the Match: How the Match Works* http://www.savethematch.org/history/howworks.aspx# (last visited May 5, 2004) ("Applicants must apply directly to programs in addition to registering for the NRMP's matching service.") [hereinafter *How the Match Works*].

[42] *See id.*

[43] *See id.*

cated algorithm to match students' and hospitals' preferences.[44] Students who do not match receive notice two to three days earlier than the general release of the Match results, along with a list of unmatched hospitals spots.[45] These students can then directly call these institutions to obtain a position in a process aptly named "the Scramble." Only students who have participated in the Match are allowed access to the list of unmatched hospital programs during the period preceding notice of the match results.[46] Thus, students who choose to forgo the Match cannot Scramble until the complete Match results are released.[47] Finally, in mid- to late-March, students receive the results of the Match on a day known as the "Match Day," and are bound to accept that result.[48] On that day, the non-participating students also can attempt to secure whatever spots remain unfilled.

In order to prevent violations of the agreement (both pre- and post-Match Day), the NRMP threatens and does punish violators. Students who are found to violate the Match agreement are reported to their medical school deans, to the American Board of Medical Specialties,[49] and to the directors of the programs that have hired the applicant.[50] Upon learning of the Match violation, a medical school dean presumably can apply disciplinary measures to the student and the program director may dismiss an applicant from the program.[51] Furthermore, the

---

44 *See id.*

45 *See id.*

46 *See* http://www.savethematch.org/history/howworks.aspx# (last visited May 5, 2004). ("Access to these lists is restricted to Match participants.")

47 *Id.*

48 *See supra* note 40 and accompanying text.

49 The ABMS is an umbrella organization of various specialty Boards. Specialty Boards are responsible for administering exams to verify physicians' competence in a given specialty. Upon passing these exams a physician can become Board certified. Although Board certification has no impact on licensure, it has a direct impact on the potential earnings. Thus, if ABMS chooses to use the Match violation as a bar to obtaining Board certification, such an action can dramatically affect the future financial fortunes of the violator.

50 This, of course, is relevant only if the director of the program did not know of the applicant's status as a violator. This could occur if an applicant matches to program A, but forgoes that offer, and obtains employment with program B, while not telling that program that he has matched somewhere else. *See* NRMP, *Agreement for Applicants & Programs*, *supra* note 38, § 7.2.1.

51 Although the NRMP Agreement is not specific on what other consequences can befall a student, it does state that aggrieved participants can resort to other remedies beyond the penalties imposed by the NRMP. *See* NRMP, *Agreement for Applicants & Programs* § 7.3. Furthermore, it would be quite pointless to notify the Dean of the medical

NRMP reserves the right to ban student violators from the Match process for up to three years.[52] Given the fact that participation in the Match is almost obligatory if one is serious about securing a residency, a bar on the participation can potentially bar an individual from becoming a licensed physician for up to three years.

The penalties against hospitals that violate the Match agreement are slightly less severe. The violator residency program may be identified as such on the NRMP website for up to three years post-violation.[53] Presumably, this identification would discourage students from ranking the program highly. Violations discovered prior to the Match day may result in the NRMP removing the residency program from the Match.[54] This removal would result in the program not receiving any of the applicants it has interviewed because those applicants would match to other hospitals. Finally, and most importantly, violator programs are referred to ACGME.[55] The status as a violator can presumably affect the accreditation process, for although ACGME doesn't require participation in the Match, it strongly encourages participation as part of the accreditation guidelines.[56]

Additionally, the NRMP takes a very broad view of the term "violations." Under the NRMP rules, not only are the programs and applicants forbidden from signing a contract prior to the Match,[57] but they are also forbidden from enticing each other into ranking them higher on the rank order list. The programs and applicants are forbidden from even asking one another about how they plan to rank each other.[58] Thus, an applicant is essentially prevented from bargaining with the program for employment conditions prior to the release of the Match results.

In addition to the above mechanisms at its disposal, starting in 2004, the NRMP has implemented an additional requirement,

---

school and/or a residency program director if these officials were powerless to take any action.

52 *Id.*

53 *Id.* § 7.2.2.

54 *Id.*

55 *Id.*

56 *See supra* note 34 and accompanying text.

57 NRMP, *Agreement for Applicants & Programs*, *supra* note 38, § 7.1.

58 *Id.* § 6.0. ("In addition, although applicants or programs may volunteer how they plan to rank each other, it is a material breach of this Agreement to request such information.")

known as the "all-or-nothing" rule. Previously, in a hospital with several residency programs (*e.g.*, one in Pediatrics, one in Surgery, etc.), some of the programs could have chosen to participate in the Match, while others, typically smaller programs, may have chosen to opt out.[59] Moreover, a program that intended to hire more than one resident did not have to offer all of its available slots through the Match.[60] In order to avoid this dual track, the NRMP has implemented a new rule that requires the entire institution to either be in or out of the Match.[61] Under this rule, an individual residency program in a given hospital would no longer be able to opt out of the Match. This new rule is likely to increase the number of participating residency programs above eighty percent, thus even further limiting the choice for students who may want to opt out of the Match.

III. Economic Analysis of the Match

A. The Anticompetitive Effects

In their complaint, the plaintiffs in *Jung* claim that the NRMP system "has the purpose and effect of depressing, standardizing and stabilizing compensation and other terms of employment."[62] This part argues that this allegation is indeed correct because, by the virtue of having students locked into the one-offer mode, the NRMP prevents hospitals and students from negotiating terms of employment. In order to understand how

---

[59] However, most programs do participate in the Match because of the ACGME's "encouragement."

[60] Indeed the program is allowed to change the number of spots available through the NRMP until end of January. *See* NAT'L RESIDENT MATCHING PROGRAM, *2004 Main Match Schedule, available at* http://www.nrmp.org/res_match/yearly.html (last visited May 5, 2004). However, even if the program withdraws slots, it is not allowed to offer these slots to U.S. medical students who participate in the Match. (The program can offer them to foreign-trained physicians who participate in the Match.)

[61] *See* NAT'L RESIDENT MATCHING PROGRAM, *Match Participation Agreement for Institutions* § 4.2, *available at* http://www.nrmp.org/res_match/policies/map_institution.html (last visited Aug 16, 2004) ("The institution agrees that all of its programs eligible for participation in the Matching Program will select senior students of U.S. allopathic medical schools only through the Matching Program, or another national matching plan. If any position is offered to U.S. allopathic students outside the Matching Program or another national matching plan, including a preliminary position for a program that participates in another national matching plan, the institution and the program will be in material breach . . . .") (Some specialties (*e.g.*, ophthalmology, urology, and otolaryngology) have their own separate matching programs that operate in a manner identical to the NRMP.)

[62] *Plaintiffs' Class Action Complaint, supra* note 3, at 5-6.

this one-offer system standardizes and depresses wages, one must first understand how the residency programs are funded.

Hospitals that run accredited medical programs are compensated for training residents. The revenue comes in two distinct streams.[63] One revenue stream is the direct subsidy from Medicare, whereby the hospital receives a certain amount of dollars per resident per year.[64] Although the formula for determining how much a hospital is entitled to for training a particular resident is quite complex,[65] generally speaking, a hospital receives an equal sum for every resident it trains no matter what specialty that resident pursues.[66] This stream of revenue is known as Direct Graduate Medical Education ("DGME") Payments.[67] Hospitals also receive what is known as Indirect Medical Education ("IME") payments.[68] These are additional payments by Medicare for the services that the resident provides to Medicare beneficiaries. In short, hospitals receive significant amounts of money for training residents.[69]

Although the hospitals do receive significant amounts of money for training residents, the DGME portion is quite stable, and is, by and large, the same for all residents. The IME portion depends on the procedures performed on Medicare patients and the resident-to-patient ratio in a given hospital. Hospitals rely on these payments when determining a resident's salary. These, however, are not the only funds hospitals receive for training residents. As with any other service, hospitals bill for, and receive payments for services rendered by the residents.[70] Further, although the federal government pays a hospital roughly the same amount of money per resident per year, fed-

---

[63] CONG. BUDGET OFFICE, *Medicare and Graduate Medical Education* at ix (Sept. 1995), *available at* ftp://ftp.cbo.gov/0xx/doc17/Gradmede.pdf (last visited May 7, 2004).

[64] *Id.*

[65] Richard M. Knapp, *Complexity and Uncertainty in Financing Graduate Medical Education*, 77 ACAD. MED. 1076, 1077 (2002).

[66] *See id.* Note that the amounts are the same across programs *within* the hospital but may vary between different hospitals.

[67] *Id.*

[68] *Id.* at 1079-80.

[69] The IME & DGME payments in FY 2002 totaled almost $9 billion dollars. *See id.*

[70] *See* HEALTH RESOURCES & SERVS. ADMIN., GRADUATE MEDICAL EDUCATION AND PUBLIC POLICY: A PRIMER 6 (2000) ("Graduate medical education has largely been funded from patient care income of teaching hospitals . . . ."), *available at* ftp://ftp.hrsa.gov/bhpr/nationalcenter/GMEprimer.pdf.

eral law does not require hospitals to divide the money equally among residents. Thus, hospitals can use money they receive from the government for one resident to pay the salary of another. Additionally, hospitals can use other streams of revenue to pay higher salaries to those residents that they deem desirable. Finally, even if we are to assume that hospitals cannot vary salaries (an assumption that this author explicitly rejects), hospitals may vary employment conditions (*e.g.*, duty hours) between those residents that it deems more or less desirable. Yet, currently hospitals do none of these things. The reason for such uniformity is the Match. The Match enables hospitals to set uniform salaries and uniform working conditions by restraining competition between hospitals for top medical students and between medical students for top hospitals.

In the market for medical schools, or the market for post-residency jobs, an applicant can hold multiple offers. (Indeed this is true for nearly all school or job markets.) Having several offers in hand, an applicant can then bargain with employers (or schools) regarding the salary or other conditions of employment (or education). Further, when an applicant has one non-binding offer, he can use it as leverage with other potential employers. Thus, an applicant with offers from more prestigious Employer A and less prestigious Employer B can approach the latter employer and propose working for him on the condition that the salary and benefits would exceed that of the former employer. If Employer B is truly interested in hiring this applicant, he would be enticed into outbidding Employer A in hopes that the difference in salary, benefits and/or conditions of employment would make up for the lower prestige.

Conversely, in a multiple offer system, a less desirable applicant would be able to approach the more prestigious Employer A and suggest that he is willing to take a pay cut if the employer would hire him. Alternatively, an employer who may be looking to save money can propose to hire a less prestigious applicant on the condition that he would take less money or work more hours.

The Match forecloses both possibilities. Under the Match system, a student cannot receive multiple offers. Consequently, an applicant cannot use one offer as leverage to obtain either a

more prestigious position or to bargain for better terms of employment with an equally or less prestigious hospital. The fact that during the application and interview process applicants can compare different employment contracts and rank programs accordingly does not mitigate the problem. An applicant can most certainly rank programs based on salary, prestige, or both. However, a given applicant does not know how many programs are actually willing to extend an offer to him, therefore, he is in no position to leverage his marketability. Further, because the Match rules forbid applicants and programs from making promises in an attempt to affect how both parties rank each other, any negotiations that could theoretically occur between a program and an applicant would either violate the Match agreement (with the concomitant consequences) or would be completely irrelevant, as there would be no way to assure that the negotiations would in the end bear any fruit.

An additional problem occurs with a single binding offer system, such as the Match. The Match's single offer mechanism also prevents a student from receiving offers in multiple specialties. Currently, a hospital pays its residents the same rate, regardless of their specialty.[71] Thus, for example, a second-year Internal Medicine resident at the New York Presbyterian Hospital earns the same amount as a second year Neurosurgery resident or a second-year Radiology resident, despite the fact that the potential future earnings of each specialty differ.[72] A stu-

---

[71] *Compare* compensation for second year resident in Neurosurgery in New York Presbyterian Hospital (Cornell Campus) Program ($47,487) (http://www.ama-assn.org/vapp/freida/pgm/0,1238,1603521052,00.html (last visited Sept. 13, 2004)), *with* compensation for second year resident in Internal Medicine at the same hospital ($45,661) (http://www.ama-assn.org/vapp/freida/pgm/0,1238,1403521270,00.html (last visited Sept. 13, 2004)). (The reason second-year residents are compared is the fact that Neurosurgery requires a preliminary year of post-graduate training. Thus, a first-year neurosurgery resident is actually in his second year of training). The salary is identical despite the fact that Internal Medicine is only a three-year program while Neurosurgery is a six-year program, despite the fact that a Neurosurgery residency is significantly more difficult to obtain, and despite the fact that once they complete the residency and enter private practice, Neurosurgeons will likely earn significantly more than Family Practitioners. To compare competitiveness of various specialties, *see* NRMP, *Data Tables*, *supra* note 14 at Table 5 (specifying that out of 4,751 Internal Medicine positions only 2,602 were filled by U.S. medical graduates and 124 positions remained unfilled, while for Neurosurgery out of 144 positions 119 were filled by U.S. medical students with only two remaining unfilled).

[72] For comparisons of average earnings in various medical specialties see Physicians Search, *First Year Starting Salary -National Average, available at* http://www.physi

dent who can hold offers from both specialties can bargain with the Internal Medicine program for a higher salary and, should he get it, he would be free to evaluate whether or not a higher salary during residency years is worth the lower future salary. A student who cannot hold multiple offers is prevented from engaging in such bargaining and evaluation of future earnings. This situation thus allows a given hospital to pay all residents the same regardless of the competitiveness of the program or the differences in the future earnings in the respective specialties.

The NRMP rules thus prevent highly marketable students from obtaining the true value of their services. The rules also prevent less marketable students from attempting to secure a position by underbidding their competitors. Futher, applicants cannot compare offers from various specialties to make a decision whether to enroll in a more competitive specialty with a lower salary but higher potential lifetime earnings, or in a less competitive specialty with a higher salary but lower lifetime earnings.

Proponents of the Match argue that the Match does not affect salaries[73] and point to an article by Muriel Niederle and Alvin Roth[74] to bolster their claim. The Niederle and Roth article investigated the salaries of gastroenterology ("GI") fellows when the Match existed for this subspecialty[75] and when the Match was abandoned. The article also compared the salaries of other Internal Medicine subspecialties, some of which do, and some of which do not, utilize the Match. The article concludes that the salary remained the same, both in the presence and absence of

---

cianssearch.com/physician/salary1.html (last visited Oct. 9, 2004), and Physicians Search, *Physician Compensation Survey -In Practice Three Plus Years, available at* http://www.physicianssearch.com/physician/salary2.html (last visited Oct. 9, 2004). Note that the average starting salary of a neurosurgeon is almost 50% higher than that of an internist ($185,000 versus $128,000). The average salary of a neurosurgeon that has been practicing for over three years is almost 300% higher than that of an internist in practice for over three years ($438,000 versus $160,000). Yet, while one is a resident the salary is identical for neurosurgeons and internists.

[73] *Save the Match: FAQ, at* http://www.savethematch.org/faq/all.aspx#q320872605 (last visited Sept. 13, 2004). ("The Match has no involvement whatsoever in setting resident stipends . . . .")

[74] Muriel Niederle & Alvin E. Roth, *What Are The Effects of a Match? Evidence from Internal Medicine, available at* http://www.stanford.edu/~niederle/Effects.of.a.Match.pdf (last visited May 9, 2004).

[75] GI fellowships are not residency programs, rather they are post-residency subspecialization programs. *See infra* note 89.

the Match.[76] The study, however, is flawed. Fellows' salaries are often based on residents' salaries (hospitals consider fellowships as additional post-graduate training and compensate accordingly).[77] The subspecialty investigated by Niederle and Roth is relatively small and narrow,[78] and the salaries within that subspecialty are essentially tied to the salaries paid to the residents (which in turn are affected by the Match). Because of the above two facts the presence or absence of the Match within an isolated subspecialty is unlikely to have any effect on the salaries within that subspecialty, so long as the Match pervades the remainder of the process.

Further, the Match involves significant transactional costs.[79] Because hospitals cannot quickly choose their most desired students, they are forced to interview more people than they would in the absence of the Match.[80] The hospitals interview more people because they are not sure who would actually match into their programs.[81] The applicants also suffer transactional costs. The increase in the number of interviews conducted by hospitals increases the costs (*e.g.*, travel, lodging) for applicants.[82] The late appointment date creates feelings of stress and uncertainty and also precludes applicants from making timely arrangements for life beyond medical school.[83] This of course also impacts applicants' spouses and families who too must wait and speculate about their future.[84]

---

[76] Niederle & Roth, *supra* note 74.

[77] *See, e.g.*, *FREIDA Online Program Information SUNY at Stony Brook Program* (specifying that the first year of a GI fellowship (available after three years of Internal Medicine training) is treated as "Graduate Year 4"), *available at* http://www.ama-assn.org/vapp/freida/pgm/0,1238,1443521012,00.html (last visited May 9, 2004). Note that the salary for a first year GI fellow (*i.e.*, a person in "Graduate Year 4") is exactly the same as a salary for a fourth year Surgery resident (*available at* http://www.ama-assn.org/vapp/freida/pgm/0,1238,4403521242,00.html (last visited Sept. 13, 2004)), despite the fact that the former has completed a full residency training and now undergoing sub-specialization, while the latter is barely half-way through his primary specialty residency training.

[78] There are only 357 GI fellows per year nationwide. Niederle & Roth, *supra* note 74 at 5. Indeed there are only 3,288 fellowship positions within internal medicine. *Id.* In contrast, there are 21,192 first-year residency positions. *See* Roth, *supra* note 12.

[79] Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L. J. 1749, 1766 (1995).

[80] *Id.* at 1767.

[81] *Id.*

[82] *Id.* at 1767-68.

[83] *Id.* at 1772.

[84] Clark, *supra* note 79, at 1772.

B. The Procompetitive Justifications and their Refutation

The proponents of the Match argue that the current system has several pro-competitive qualities. In passing the Pension Funding Equity Act of 2004,[85] Congress agreed with the Match's proponents and found the Match to be a "highly efficient, pro-competitive" process.[86] This section examines the arguments advanced by the Match's proponents and accepted by Congress, and concludes that these arguments are not convincing.

The NRMP claims that the Match is procompetitive because it allows students to (1) "[c]ompletely and thoroughly evaluate each program they are considering without the pressure of early 'exploding offers;'" (2) "[d]elay making their final decisions until after they've had more clinical experience on which to base their choices;" and (3) "[c]ompete based on merit rather than influence."[87] We will look at these arguments in turn.

The Match process does indeed ensure that students are not faced with "exploding offers." It is, however, questionable whether the prevention of exploding offers is indeed pro-competitive.

First, it is altogether unclear to this author whether the exploding offer is a real or is merely a strawman argument. For example, neither colleges nor medical schools employ exploding offers when recruiting students.[88] It is unclear why residency programs would utilize such a tactic. Further, this author has

---

[85] Pension Funding Equity Act, *supra* note 6.

[86] *Id.* § 207(a)(1)(E).

[87] Save the Match FAQ *at* http://www.savethematch.org/faq/all.aspx (last visited Mar. 10, 2004). The NRMP advances two additional reasons, namely that the Match allows students to "[r]ank programs in accordance with the students' true preferences, without having to worry about whether a program's interest in them is genuine or not or prejudicing their ability to secure a position at one of their 'safe' choices;" and to "[t]ry to get into the best programs in the specialty they wish to practice, without prejudicing their ability to secure a position at one of their 'safe' choices." The last argument is essentially a repetition of the very first one advanced. The second to last argument is a *non sequitur.* The ability to rank programs is neither pro- nor anticompetitive. To the extent that this argument advances the position that the Match allows students to explore more preferred options without fear that the "safe" choices would fill-up with other applicants via the use of exploding offers, this argument is dealt with when addressing NRMP's first claim of procompetitive effects.

[88] *See, e.g.,* AM. ASSOC. OF MED. COLLEGES, *Recommendations Concerning Medical School Acceptance Procedures for First-Year Entering Students, available at* http://www.aamc.org/students/applying/policies/admissionofficers.htm (last visited Oct. 6, 2004). ("Prior to May 15 of the year of matriculation, an applicant should be given *at least two weeks* to reply to an offer of admission") (emphasis added).

not been able to find any evidence of exploding offers in medical fellowships.[89] If the exploding offer is truly a problem, one would expect it to occur in fellowships that do not participate in the Match. Yet, this problem does not arise. This leads one to conclude that even with the elimination of the Match, exploding offers will not become a serious problem.

Second, even assuming that exploding offers will make their return in the absence of the Match, it is debatable whether NRMP's way of eliminating this eventuality is procompetitive. The problem with this is that Match benefits are not evenly distributed between hospitals and students. The hospitals who seek the most qualified applicants benefit from the Match because they are assured that these applicants would not be seized early.[90] The second-tier hospitals, on the other hand, lose because, in the absence of the Match, they could have obtained more desirable residents by enticing them to commit early.[91] It is questionable whether applicants actually enjoy any benefit at all in this system. Although the most sought after applicants gain in the Match system because they have an opportunity to weigh different options and make their true choice, they lose because they cannot parlay their marketability into either an early secure offer (thus decreasing their stress) or multiple offers that can be used as leverage. On the one hand, the less desirable applicants benefit because the most desirable slots are not quickly taken by the best applicants. On the other hand, these applicants lose because they cannot compensate for their relative lack of marketability by making an early commitment to the hospital and thus saving that hospital money on the additional search.

---

89 Fellowships are programs where a physician who has completed training can obtain additional training in a subspecialty. For example, after completing a Radiology residency, a physician may choose to pursue a Pediatric radiology fellowship. Fellowships are run similar to residency programs, and fellows' compensation is significantly lower than that of practicing physicians. Although some fellowships participate in the Fellowship Match, most do not. The NRMP currently provides matching services to only 35 fellowship subspecialties. For a list of fellowship subspecialties participating in the NRMP *see* http://www.nrmp.org/fellow/index.html (last visited May 7, 2004).

90 *See* Clark, *supra* note 79, at 1772-73 (arguing that a matching system similar to the NRMP if implemented for the federal judiciary would primarily benefit the judges interested only in the top-notch applicants). The same logic applies to the Match in the context of selecting a residency.

91 *See id.*

The second argument put forth by the defenders of the Match is that the program prevents the creep in the timeline that was experienced before the Match. This argument is flawed because the Match was not the mechanism that solved the forward creep in the appointment dates. That problem was solved when medical schools agreed to embargo academic records until the beginning of the fourth year.[92] As described in Part II, *ante*, this agreement resulted in medical students being selected for residency at the most appropriate time in the cycle, *i.e.*, during the fourth year of studies.

Moreover, today's medical students' search for residency differs from the search of the students of the 1940s in one important aspect. Today, many residency programs require that students submit the results of the first in a series of licensing exams, the United States Medical Licensing Exam, the USMLE, Step I, with their application.[93] This exam was not administered in the 1940s.[94] The majority of today's students take the exam between their second and third year,[95] as the exam tests the subjects taught during the first two years.[96] Because the score on the exam often determines competitiveness for a residency slot[97] and because the exam cannot be retaken once passed,[98] students

---

92 *See supra* notes 23-24 and accompanying text.

93 *See* UNIV. OF ILL.-CHICAGO, COLL. OF MED., OFFICE OF STUDENT AFFAIRS CAREER PLAN. RESOURCES, *Residency Application Process, available at* http://www.uic.edu/depts/mcam/osa/careers/residency/ResComponents2005.pdf (last visited May 10, 2004) ("Step I scores are an important tool used by many programs to screen applicants for residency interviews and provide a basis for comparison. The more competitive the program, the higher the Step I score required.").

94 The USMLE was introduced in 1994. *See* Gregory Dolin, *Licensing Health Care Professionals: Has the United States Outlived the Need for Medical Licensure?*, 2 GEO. J. L. & PUB. POL'Y 315, 319 (2004).

95 *See, e.g.*, UNIV. OF N. C., SCH. OF MED., *Policy for Completion of the USMLE Step 1 & 2 Exams, available at* http://www.med.unc.edu/curriculum/Administration/usmle.htm (last visited May 10, 2004). ("Typically, students are expected to take Step 1 for the first time in May or June following the completion of the second year."); UNIV. OF TEX.-SOUTHWESTERN, SCH. OF MED., *Catalog, Second Year: Medical School Curriculum, available at* http://www8.utsouthwestern.edu/utsw/cda/dept137886/files/137919.html (last visited May 10, 2004) ("Students will usually take the U.S. Medical Licensing Examination Step 1 at the conclusion of the second year.")

96 *See* U.S. MED. LICENSING EXAMINATION, *STEP 1 Content Outline, available at* http://www.usmle.org/step1/intro.htm. ("The test is designed to measure basic science knowledge.")

97 *See supra* note 93.

98 *See* U.S. MED. LICENSING EXAMINATION, *2004 Bulletin, Eligibility, available at* http://www.usmle.org/bulletin/2004/eligibility.htm. (last visited May 10, 2004) ("If you pass a Step, you are not allowed to retake it . . . .")

are unlikely to attempt to take it before the end of their second year. The results of the exam are usually available a month later.[99] Thus, at the very least, residency programs would not recruit until the Step I results become available, *i.e.*, somewhere in the middle of the third year, at the earliest.

The next argument advanced by the proponents of the NRMP suggests that the Match allows students to compete on merits, rather than on connections.[100] To begin with, it is a rather dubious proposition. It should be beyond dispute that an applicant whose family member is, for example, a senior staff member or a large donor to a given institution is in a better position than a no-name applicant whether with or without the Match. It should also be beyond dispute that a program director is no more likely to deny a favor to his superior, benefactor, or college buddy in the presence of a Match system than in the absence thereof. Of course, the rankings are not released,[101] but if the connected applicant did not match in the desired place, it would become clear quite quickly that the program director refused to rank said applicant high enough. Whatever repercussions such program director would face in an open market system for refusing to accommodate his superior, benefactor, or college buddy, are present in the Match system as well. The only difference is that in the latter system the repercussions are delayed until the Match Day. Thus, the argument that the Match eliminates (or even mitigates) the influence peddling in the residency selection process is wholly without merit.

The Match has few, if any, procompetitive effects. The potential justifications advanced by the NRMP do not withstand scrutiny. However, even if the claims asserted by the NRMP are correct, the procompetitive effects are so minor that they do not justify the existence of the Match. It is to this argument that the article now turns.

---

99 U.S. MED. LICENSING EXAMINATION, *2004 Bulletin, Scoring and Score Reporting, available at* http://www.usmle.org/bulletin/2004/scoring.htm. (last visited May 10, 2004) ("Step results typically have been available in time to mail your report within three to four weeks after your test date".)

100 *See supra* note 87 and accompanying text.

101 *See* NAT'L RESIDENT MATCHING PROGRAM, *Frequently Asked Questions about the NRMP's Interactive Web Site, available at* http://www.nrmp.org/res_match/faq/us_seniors_faq.html (last visited May 10, 2004) (specifying that the applicant is "the only one, other than the NRMP staff, who can access your rank order list").

IV. The Legal Analysis of the Match

As mentioned previously, Congress has enacted legislation that essentially provides the NRMP a blanket exemption from antitrust liability. The legislation does not even permit the fact that a residency program participates in the Match to be used as evidence in court.[102] Thus, it is likely that the law as it currently stands would allow the NRMP to escape liability.[103] However, because this author believes that the predicate for congressional action is incorrect (*i.e.*, that the Match is a "highly efficient, procompetitive . . . process"),[104] it is worth analyzing how the NRMP would have fared under the traditional antitrust jurisprudence. This part explores the legal landscape facing the NRMP as it stood before the enactment of the Pension Funding Equity Act of 2004.[105]

The legal framework under which the Match is to be analyzed is not crystal clear because, as explained above, the Match does not *directly* set prices. However, as argued in Part III.A, *ante*, the Match does empower participants to set prices. The courts have found certain behavior anti-competitive even if it does not directly affect prices.[106]

For example, in *Professional Engineers*,[107] the Supreme Court required the association of engineers to affirmatively defend an ethics rule prohibiting members from discussing fees with prospective customers prior to being selected for a project because the agreement "impede[d] the ordinary give and take of the market place."[108] Similarly, in *Indiana Dentists*,[109] the Court ruled that the withholding of X-rays from patients' insurers was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the

---

102 Pension Funding Equity Act, *supra* note 6, § 207(b)(2). ("Evidence of [participating in any matching program] shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws.")

103 The District Court has already so ruled. *See supra* note 2.

104

105 Pension Funding Equity Act, *supra* note 6.

106 *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

107 435 U.S. 679 (1978).

108 *Id.* at 692.

109 476 U.S. 447 (1986).

purchase of higher priced services, than would occur in its absence."[110] The key question, therefore, is not whether the Match mechanism actually sets prices, but whether the Match "disrupt[s] the proper functioning of the price-setting mechanism of the market."[111]

First and foremost, under traditional antitrust jurisprudence, the court must determine whether the arrangement affects commerce. In the present case, the defendants have argued that residency training is not commerce and that residents are not employees.[112] Instead, the defendants contend that residency training is education and residents are students who learn "hands-on."[113] This argument should be quickly rejected by the courts. Hospitals and residents exchange money for services. Hospitals pay residents a salary (or provide them with a stipend, to use NRMP's terminology[114]) in exchange for the services residents perform in treating patients. In addition to receiving monetary compensation, the residents also receive an educational benefit, the mere receipt of which cannot possibly remove the resident-hospital relationship outside the scope of commercial activity. As far back as 1975, the Supreme Court has emphatically stated that "the exchange of [ ] a service for money is 'commerce' in the most common usage of that word."[115] Even if one agrees with the defendants' view that residency training is education and education only, one still would have to conclude that the activity is commercial. In *U.S. v. Brown University*,[116] the Third Circuit held that educational institutions such as universities engage in commerce, and thus fall under the antitrust laws, when they "sell" their education to the students.[117]

---

[110] *Id.* at 461-62.

[111] *Id.*

[112] Jung v. AAMC, *Motion of Defendant ACGME to Dismiss* at 2. The motion was joined by four hospital defendants. *See Opinion on Motions to Dismiss* at 84, n.35 (Feb. 11, 2004).

[113] *See, e.g.*, Jordan J. Cohen, *An Unqualified Victory*, *available at* http://www.aamc.org/newsroom/reporter/sept04/word.htm (last visited Oct. 9, 2004). ("[O]ur residents are primarily learners, not employees")

[114] *See generally* Save the Match FAQ, *available at* http://savethemath.org/faq/all.aspx (last visited Oct. 9, 2004). Note that throughout the website the word "salary" is not used. Instead, compensation is referred to as a "stipend."

[115] Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975).

[116] *Brown Univ.* 5 F.3d 658 (3d Cir. 1993).

[117] *Id.* at 666. ("[T]he payment of tuition in return for educational services constitutes commerce.")

The teaching hospitals certainly engage in commerce at least to the extent the universities do.

Having resolved the preliminary question of the applicability of antitrust laws, the next part of the examination is what standards the court is to utilize in adjudicating the case against the NRMP. The Match is an arrangement made by and for professionals, ostensibly for the benefit of the profession. The Supreme Court has said on several occasions that judgments of the professionals with respect to their profession merit a more differential review than most other contracts or combinations.[118] Therefore, it is highly unlikely that the courts will conduct anything less than a full review that would balance anticompetitive and procompetitive effects.[119] Utilizing the "rule of reason" balancing test approach, the court will have to determine whether the benefits that the Match provides justify its existence.[120]

---

118 *See, e.g., Indiana Fed'n of Dentists*, 476 U.S. at 458-59; *Professional Eng'rs*, 435 U.S. at 696; *Goldfarb*, 421 U.S. at 788-789, n.17.

119 *See* United States v. Brown Univ., 5 F.3d 658, 670. ("The [Supreme] Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), counseled against applying traditional antitrust rules outside of conventional business contexts.")

120 The "rule of reason" comes from the 1911 Supreme Court case *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Although the Sherman Act states that *every* agreement in restraint of trade is unlawful, in certain situations that would lead to absurd results (*e.g.*, attorneys forming a partnerships and agreeing not to compete against themselves would technically be an agreement in restraint of trade and therefore not permitted under the literal reading of the Sherman Act). In *Standard Oil*, however, the Supreme Court clarified that only those agreements that are *unreasonable* will be held to be illegal. Thus, agreements in restraint of trade could be defended if some reasonable purpose was offered. Nonetheless, some agreements (*e.g.*, outright price-fixing) have been held to be so inherently unreasonable that no explanation would be sufficient to justify them. *See* United States v. Topco Assocs.,405 U.S. 596, 607-08 (1972) ("While the Court has utilized the 'rule of reason' in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are per se violations of the Act without regard to a consideration of their reasonableness. . . . It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.")

Because of their unique status, professions have been treated more deferentially by the Supreme Court. Agreements within professions are almost always subject to the "rule of reason," as opposed to "per se" analysis because the Court allows for the possibility that the obligations of the profession to those they serve may mandate arrangements inappropriate to other business ventures. *See, e.g., Goldfarb*, 421 U.S. at 788 n.17 ("The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. . . . The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.") Thus, the Match, as an arrangement by the medical profession could (under the traditional antitrust analysis) only be deemed illegal if it is proven that the it is an *unreasonable* restraint of trade.

Although this article suggests that there are indeed no benefits to the Match and the benefits claimed by its proponents are illusory, for the purposes of the discussion below, the author assumes that the benefits as put forth by the NRMP do exist.

Courts have consistently held that social welfare concerns cannot justify restraints on competition.[121] This legal rule should eliminate NRMP's third and fourth justification.[122] The epitome of the social benefit justification is competition based on merit and the ability to rank programs according to true preferences. These justifications, therefore, cannot serve as a counterweight to the costs that the Match imposes on the applicants. We are thus left with the justifications that the Match allows students to (1) "[c]ompletely and thoroughly evaluate each program they are considering without the pressure of early 'exploding offers;'" and (2) "[d]elay making their final decisions until after they've had more clinical experience on which to base their choices."[123] These justifications are arguably economic because they promote more informed consumer choice.

In evaluating whether the reasons advanced by the proponent of a restraint on trade are sufficient to justify the restraint, the court must decide "whether the challenged agreement is necessary to achieve its purported goals."[124] Using this test, it should be quite clear, given the discussion *ante*, that the Match is completely unnecessary to achieve the NRMP's second goal (*i.e.*, allowing the students to "[d]elay making their final decisions until after they've had more clinical experience"[125]). An agreement to withhold students' data prior to a certain date during or at the end of the third year is sufficient to meet this goal.[126] This embargo would be easier to maintain than in the past because of

---

For a comprehensive discussion on the rule of reason see Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571 (1986).

121 *See Brown Univ.*, 5 F.3d at 669 *citing Prof'l Eng'rs*, 435 U.S. at 695; *Ind. Dentists*, 476 U.S. at 463 ("A restraint on competition cannot be justified solely on the basis of social welfare concerns.")

122 As indicated previously, NRMP's fifth contention is that with the Match students can "[t]ry to get into the best programs in the specialty they wish to practice, without prejudicing their ability to secure a position at one of their 'safe' choices." This argument is merely a repetition of the first one and does not warrant a separate discussion. *See supra* note 87.

123 *See supra* note 87 and accompanying text.

124 *Brown Univ.*, 5 F.3d at 678.

125 *See supra* note 87 and accompanying text.

126 *See supra* note 93 and accompanying text.

the presence of an additional backslide stopper, the USMLE Step I.[127]

Nor does the NRMP's first concern justify the existence of the Match. To battle that problem, an agreement to keep the offers open for a given period, similar to the one employed by the National Association for Law Placement, should be sufficient.[128] The expected counter-argument would be that such a system would fail just like it did in the late 1940s and early 1950s. That argument should be rejected because the residency market in the 1940s is simply not analogous to the residency market today. For example, in the 1940s, residency was optional and today it is required.[129] Thus, hospitals should be less likely to attempt to lock-in students because, unlike the 1940s, students may not choose to forgo post-graduate training. In any event, given the fact that exploding offers have not created a problem in the market for physicians post-residency (whether seeking a fellowship or entering the market as a practitioner), nor in the market for students seeking to enter medical schools even in the absence of a comparable matching mechanism,[130] it should stand to reason that the Match is wholly unnecessary to protect medical students from the problem of exploding offers. Moreover, even if the Match is necessary to prevent exploding offers, the benefit obtained does not outweigh the anti-competitive effects of the system.

After examining the necessity of the Match to achieve the purported pro-competitive benefits, the courts should conclude that the Match is too broad a restraint to justify the advantages it

---

127 *See supra* notes 93-99 and accompanying text.

128 *See* NAT'L ASSOC. OF L. PLACEMENT, *Principles and Standards* § IV.F.1, *available at* http://www.nalp.org/pands/pands.htm (last visited May 10, 2004) ("Employers should give candidates a reasonable period of time to consider offers of employment and should avoid conduct that subjects candidates to undue pressure to accept."). NALP guidelines provide specific regulations for specific situations and specify how long the offers should be kept open, and conversely specify how many offers an applicant is allowed to hold at a given time. *See id.* § V.

129 *See, e.g.*, N. C. MED. BD., *A Brief History of the North Carolina Medical Board: 1859-2000 available at* http://www.ncmedboard.org/brdhst.htm (last visited May 5, 2004). ("Prior to 1977, applicants for a license were not required to have post-graduate medical education or training. With an amendment to the Medical Practice Act at that time, applicants for a full license were required to have at least one year of post-graduate training. Then, in 1985, the law was modified to require three years of post-graduate training for foreign medical graduates.")

130 *See supra* note 89 and accompanying text.

brings.[131] Alternatively, the benefits of the Match do not outweigh the costs that the system imposes.

V. The Alternative Solutions

If the current Match mechanism for securing a residency position is to disappear, an alternative system is needed to take its place. The alternatives can be broadly described as falling into three categories: (1) a voluntary matching system, (2) a binding multiple matching system, and (3) the free market system. The first system operates much like today's Match, but both students and programs are able to withdraw at any time and there is no obligation to honor the match if it occurs. The second system also operates similar to the present-day Match, except that a student can be matched into multiple locations and then can choose and bargain with the programs. The third option is self-explanatory. This part will discuss each option in turn.

A. A Voluntary Match

One of the solutions proposed by the plaintiffs in *Jung* is to make the Match voluntary.[132] A voluntary approach would keep most of the features of the Match in place, but would allow students to opt out of the program at any point.[133] The same opt-out option would exist for the residency programs.[134] This solution potentially solves the main problem with the Match, for it would allow students to receive multiple offers and to evaluate them. Although this solution may well pass the antitrust scrutiny, it is unsatisfactory.

Whether the Match is mandatory or voluntary, the transaction costs associated with running the program remain.[135] Hos-

---

[131] This author remains convinced that the Match indeed brings no benefits. To the extent however, that some advantages flow from the arrangement, these advantages are insufficient to justify the restraint.

[132] *See* Jung v. AAMC, *Plaintiff's First Supplemental Answer to Defendants' Common Interrogatory Relating to Class Certification* at 2, *available at* http://residentcase.com/03_solutions_alternatives/pdf/Interrogatory_Answer.pdf (last visited May 10, 2004); *see also, The "Voluntary Match," Proposed Improvement to the Current National Residency Matching Program, available at* http://residentcase.com/03_solutions_alternatives/pdf/The_Voluntary_Match.pdf (last visited May 10, 2004) [hereinafter *The Voluntary Match*].

[133] *See The Voluntary Match, supra* note 132, at 3.

[134] *Id.* at 2.

[135] *See supra* notes 79-84 and accompanying text.

pitals, if they remain committed to this new mechanism, would still interview more students than necessary[136] and students would again have to in many cases put the planning of their future life on hold.[137]

The most fundamental problem with a voluntary Match, however, is that it may not be feasible. Because of certain transactional costs associated with running the Match, it may become too costly to run a program in which very few participants are bound. The long-term survival of any voluntary matching scheme is doubtful because of the rather high costs and rather uncertain result.[138] For these reasons, a voluntary Match is not the appropriate solution.

B. A Binding Multiple Match

Yet another solution was proposed by Ms. Melinda Creasman.[139] Ms. Creasman argues for a system indistinguishable from the one the NRMP is currently running, except for the fact that on the Match Day, a student would match to two hospitals.[140] Unfortunately, this proposal only barely addresses the problems with the current Match while keeping the transactional costs. Further, the proposal may be completely unworkable.

First, the multiple binding match system still limits the applicants to a given number of matches.[141] This in turn limits their ability to truly weigh *all* possible options. While there is little dispute that a choice between two programs is better than no choice at all, no arrangement should arbitrarily limit the choices of graduating medical students in the U.S. .

Additionally, any systematic Match system (single or multi-

---

136 *See supra* notes 79-80 and accompanying text.

137 *See supra* notes 81-83 and accompanying text.

138 *See* Clark, *supra* note 78, at 1764 (arguing that "a matching system is bound to disintegrate unless virtually all programs with positions to offer participate"). Clark provides several examples of matching programs that failed because of lack of participation. *See also* Alvin E. Roth & Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 AM. ECON. REV. 992 (1994) (describing how matching systems that lack commitment unravel).

139 *See* Creasman, *supra* note 33.

140 *Id.* at 1473-75.

141 Ms. Creasman proposes a maximum of two matches. This of course prevents the applicant who could have gotten three or more offers from truly exercising his own marketability.

ple) retains the rather high transaction costs.[142] Indeed, the transaction costs may be increased because hospitals would need to interview twice as many candidates as they interview under the current system, with no particular assurance that their efforts will result in the desired candidates accepting their offer.

In a multiple match system, the legal analysis and the balancing of interests remain the same as in the current system. If it is accepted that the current Match provides no benefits, or that the benefits it provides do not justify the restraints, one must conclude the same with respect to the multiple match system.

Finally, a multiple match system may prove to be completely unworkable. As previously stated, any program that enrolls residents must be accredited by the ACGME.[143] One of the major criteria for ACGME accreditation is "the adequacy of resources for resident education such as quality and volume of patients and related clinical material available for education, faculty-resident ratio, institutional funding, and the quality of faculty teaching."[144] Accordingly, a program is accredited to train only a certain number of residents.[145] Under the ACGME rules, a residency program cannot hire residents in excess of its accredited capacity.[146] A multiple match system may result in an over-enrollment of residents in some programs and an under-enrollment in others. In a multiple match system, a student may receive two (or any other number larger than one) offers. Presumably, then a given hospital must extend twice as many offers, given that any student offered a position can enroll in the second program. However, if the Match results are binding, there is nothing to prevent all individuals to whom the hospital has extended the offer from taking it. Thus, a hospital may end up with up to twice (or thrice, depending on the number of multiple matches) residents as it can enroll under the ACGME guidelines. Another hospital may end up with no residents at all. This

---

142 *See supra* notes 79-84 and accompanying text.

143 *See supra* note 34 and accompanying text.

144 ACGME, *Common Program Requirements* § II.B, *available at* http://www.acgme.org/DutyHours/dutyHoursCommonPR.asp (last visited May 10, 2004).

145 *Id.* ("A[ ] R[esidency] R[eview] C[ommittee] may approve the number of residents based upon established written criteria.").

146 *See id.*

problem may be able to be solved by hospitals ranking a number of students not to exceed its allotted slots. The hospital would then wait for the Match results and acceptances, and fill whatever slots remain through either the Scramble or a second-round Match. This procedure seems to be quite cumbersome and unwarranted given the rather minimal improvement it would have over the status quo.

C. A Free Market System

A free market system of applying for and obtaining residency positions solves the problems discussed *ante*. In this system, a student can receive any number of offers and can use them to negotiate the best contract possible. A student can also attempt to obtain a coveted position by underbidding other students. Should the hospital be more interested in saving money than in recruiting the most prestigious students, it may well choose to hire an individual who is willing to work at a lower compensation rate. Thus, both the hospitals and the students would be able to engage in the ordinary give and take of the market place.[147]

Two problems exist with a completely open free market system. The first problem is the forward creep of the appointment date. The second problem is the dilemma of exploding offers. Both of these problems can be resolved by agreements that would limit the dates of entry into the market place and promulgate rules for open offers.

In order to prevent the forward creep of the appointment date, all that is needed is an agreement similar to the one reached by medical schools in 1945[148] or an agreement similar to the one currently utilized in the federal judicial law clerk selection process.[149] This should resolve any concerns about the forward creep of the appointment date and would allow students to fully sample various specialties during their third year prior to making a decision about their career.

---

147 Prof'l. Eng'rs., 435 U.S. at 692.

148 *See supra* notes 22-23 and accompanying text.

149 *See Summary of Law Clerk Hiring Plan for 2004, available at* http://www.cadc.uscourts.gov/bin/Lawclerk/Lawckerkpdf/Summary_of_the_Plan_for_2004.pdf (last visited Oct. 6, 2004) (specifying that the process is not to begin earlier than a certain date).

The problem of exploding offers may or may not be a real problem. This article has already discussed that exploding offers do not plague medical school or fellowship admission processes.[150] There is no particular reason, therefore, to believe that exploding offers would return to the residency selection process. Further, the very premise that the search for residency employment should operate under different terms than the search for any other employment is questionable.

If, however, one believes that exploding offers are problematic and should be eliminated, a rule could be promulgated (perhaps as a part of ACGME accreditation standards, to make it enforceable) requiring hospitals to keep any extended offer open for some reasonable period of time, for example five days. Such a rule would allay any concerns regarding exploding offers.

The only remaining question is whether the above proposed rules would pass judicial muster.[151] After all, these rules also restrict trade insofar as they do not allow the market participants to engage in negotiations at such time as they deem fit and to make such offers as they seem appropriate. However, it is likely that these rules would indeed survive antitrust scrutiny. As the Supreme Court has stated "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[152] Because the embargo rule is likely to promote economic efficiency by providing students with additional information before they make their choices regarding specialty, it is likely to be upheld. The same is true with respect to the open offer rule. The rule would promote competition by allowing students to entertain multiple offers.

Thus, a free market scheme limited only by the rules regulating the timing of recruiting and the continuous availability of offers made would provide the best system for students and hospitals to negotiate conditions of employment while avoiding the pitfalls of the pre-Match era.

---

150 *See supra*, Part III.A.

151 In light of the Pension Funding Equity Act of 2004, any set of matching or non-matching rules would likely pass judicial muster. This question, however, is whether under *traditional* antitrust theory the proposed rules would survive.

152 Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

VI. Conclusion

The Match system run by the NRMP started out as an attempt to bring order to medical students' frustrating experience of attempting to secure residency positions. Over the years, however, the Match has become so restrictive as to limit students' choice and ability to obtain the best deal for the hard work they provide. Congress erred when it declared the Match to be procompetitive and efficient and should reconsider its conclusion on these issues.

The time has come to abandon the Match and to allow students to engage in true negotiations with the potential employers. Any attempt to resuscitate the Match by restructuring it will only mask the problem without providing any real benefits. The time has come to let the Match die and not attempt any heroic measures to save it. The time has come to recognize that the market for medical residencies should be treated like any other employment market.