

Special Purpose Audit

By Carlton Harker

Overview

This Audit has the single purpose of determining whether any acts of any health plan vendors or providers might be deemed unfair methods of competition or unfair acts or deceptive practices as contemplated by relevant state or federal laws. While the health care plan is the enterprise engaging the parties to the audit, the focus of the Audit is on vendor or provider activity, which is only tangential to the subject health plan. That is, ERISA infractions are not the target of the Audit.

The Audit is presented in these parts:

- Parties
- Purpose
- Scope
- Auditor
- Results/Commentary
- **Appendices**
 - Sources of Information
 - Unfair and Deceptive Practices
 - Description of Potential Infractions

Parties

The Parties to this Audit are as follows:

- *Plan Sponsor*
- *Health Plan*
- *Providers*
- *Producers*
- *Stop-loss (S-L) Carrier*
- *Utilization Review (UR)*
- *Managed Care Organization (MCO)*
- *Claims and Recordkeeping Administrator (TPA)*
- *Managing General Underwriter (MGU)*
- *Auditor* means
- *The Audit Sponsor* Such entity, unless otherwise shown, has financial responsibility for the Audit.



Purpose

The Report must make clear in its narrative as to whether the purpose of the Audit is to be:

■ **Precautionary**

This purpose is of the nature of an internal or prophylactic audit. Any infractions would be corrected so that the Audit Sponsor has the comfort of a *clean bill of health*.

■ **External**

This purpose is of the nature of an outside or regulatory audit. Any infractions might be used against the party (or Parties) involved.

The purpose of the Audit is to assert, positively or negatively, as follows:

- Because of potential conflicted interests...
- Certain named parties, individually or in concert...
- Did commit certain acts or follow certain practices....
- Which might possibly violate the statutory or common-law meaning of "unfair methods of competition and/or unfair or deceptive acts or practices"...
- Where such alleged infractions are set forth and discussed in the Audit Report...
- Following the instructions, appendices and agreements attached hereto.

Scope

The Scope of the Audit is to provide detailed responses to the following questions:

Hospital Billing

Did any hospital provider have a billing practice whereby its variations from a chargemaster are not economically justifiable? Explain.

Bundled Services

Are any of the four major vendors (UR, TPA, S-L, MCO) tied together (by ownership, contract or otherwise) in a combination of either two, three or four in a manner whereby potential conflicted interest exists? If such response is yes, are any of the

potential acts deemed to be unfair methods of competition or unfair or deceptive acts or practices? Explain.

Other Issues

To what extent, if any, might an act, identified as a potential unfair method of competition or unfair or deceptive act or practice, also be an incipient act of restraining trade or creating a monopoly? Explain.

Auditor

The Auditor uses the following professional skills in the preparation of the Report:

- ___ Claims processing and recordkeeping
- ___ Accounting
- ___ Actuarial
- ___ Economic
- ___ Legal
- ___ Other.

The Auditor may be guided in its conduct of the Audit by the items set forth or referenced on the Appendices. The Auditor may find it needful to subcontract some of the special questions to professional skills not available through the Auditor (economist, attorney, actuary, e.g.). The actuary might be helpful if issues of pricing are germane. The Auditor must profess independence and the report, including the opinion of any contributing specialist professionals, must be acceptable as an independent report.

Results/Commentary

The text of the Audit Report is provided here.

Appendices

Sources of Information

- www.antitrusthealth.com
- FTC Web Site
- State Attorneys General.

Description of Potential Infractions

Attached hereto is a sample listing of most of the possible infractions which should gain the attention of the Auditor.

Unfair and Deceptive Practices

Attached hereto is a brief critique of the statutory and/or common-law meaning of this term.

Unfair and Deceptive Practices

Statutory Background

The United States Code (15 USC §45(a)(1)) declares as illegal the following:

1. Unfair methods of competition...
2. Unfair or deceptive acts or practices...
3. Which affect commerce.

The *litmus test* of whether an act is an unfair method of competition is three-fold:

1. Is commerce affected?
2. Is competition substantially lessened?
3. Is there a tendency for a monopoly to be created?

This is ultimately a judicial and not an administrative decision.

The *litmus test* of whether an act or practice is unfair or deceptive is as follows:

1. Is commerce affected?
2. **General Questions**
 - a. Is public policy offended?
 - b. Is the act characterized by any of the following, e.g.:
 - Immoral
 - Libelous
 - Unethical
 - Illegal
 - Oppressive
 - High pressure
 - Unscrupulous
 - Fraudulent
 - Injurious to the general public.
 - c. Without regard to any acts, are there any unfair provisions in any contracts of adhesion?
3. **Specific Questions**
 - a. Are services of A passed off as services of B?
 - b. Does the act cause the likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of services?
 - c. Does the act cause the likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another?

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- d. Does the act use deceptive representations or designations of origin in connection with the services?
- e. Does the act represent that the services have sponsorship approval, characteristics, ingredients, uses, benefits or qualities that they do not have or that an entity has a sponsorship, approval, status, affiliations or connection that it does not have?
- f. Does the act represent that the services are of a particular standard, quality or grade, if, in fact, they are of another?
- g. Does the act create the likelihood of confusion or misunderstanding?

Traditional and Common-Law Meanings

Unfair Competition

This is a widely used term that has gained a place in common-law.

General Use

Any dishonest or fraudulent act in trade or commercial rivalry.

Particular Use (Example)

The practice of substituting one's own goods or services for those of another by capitalizing on such other firm's reputation, name, etc. that is, infringement of trade-name or similar.

Unfair competition is a tort involving the misappropriation for commercial advantage of a benefit or right belonging to another. It is the simulation by Firm A of certain product or service characteristics of its competitor, Firm B, such as trade names, materials, services, etc. Thereby falsely inducing the purchase of goods or services. This act has the common-law name of *passing off*. In brief it is the selling of another firm's services or products as one's own.

Unfair competition includes the following:

- Deceitful advertising
- Bribery of employees
- Secret rebates and/or concessions.

The true test of unfair competition is, when comparing the two products or services, that:

- Perfect simulation need not be achieved.
- Similarity is all that is needed to make the act unfair.

Unfair Methods of Competition

This term is unique with the FTC Act (15 USC§45) and is broader than the term unfair competition. The term, by design, is not defined but its meaning is to be a function of the following:

- Particular instance...
- Particular competitive condition...
- Specific and substantial public interest...

All supported by evidence provided.

The concept of unfair methods of competition was not to restrict fair and free competition among honorable opponents, nor was it to give license to acts heretofore deemed immoral, unethical or against public policy.

Carlton Harker; FSA, MAAA is a well known and respected member of the self-funding community and has been an active participant in the



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