Chapter 5

Trade and Commerce Issues

Part A – Antitrust, Competition, Price Discrimination and Restraint of Trade

In General

There are two basic antitrust laws in the United States: the Sherman Act and the Clayton Act each enforceable by the Antitrust Division of the Department of Justice, the Federal Trade Commission or private persons alleging economic injury caused by violation of either of such Acts. In addition, the Federal Trade Commission Act and the Robinson-Patman Act may also be utilized by the Commission and private persons (only the Commission may enforce its Act, however). Together, they spell out the conduct and activities prohibited in economic and market transactions. There are also some statutes directed to specific industries or types of transactions which indicate the likely antitrust consequences for economic conduct in those areas. These include the (a) Federal Trade Commission Act, (b) National Cooperative Reserve Act, (c) the Export Trading Company Act and (d) the McCarran-Ferguson Act.

Sherman Act

This Act is codified at 15 USC §§1-7 and (a) prohibits contracts or conspiracies in restraint of trade (which phrase has been, since at least 1911, judicially interpreted as meaning unreasonable restraints of trade), (b) prohibits monopolization or attempted monopolization and (c) prohibits mergers or acquisitions which may tend to lessen competition.

Clayton Act

This Act is codified at is 15 USC §§12-27 and (a) sets forth the damage provisions of the Sherman Act; (b) attempts to prohibit trade and commerce violations at their incipiency and (c) contains pre-merger notification guidelines.

Robinson-Patman Act

This Act is codified at 15 USC §13 and while not technically considered an antitrust statute does prohibit price discrimination and mandates that two or more purchasers of a commodity from the same seller must be charged identical prices. There are exceptions to this mandate, however, such that the Act may be seen to prohibit only unjustified price differentiation. There are also jurisdictional limits to the Act. The courts have interpreted the Act so that all the sales in question must be in interstate commerce. "Robinson-Patman applies only to sales of

commodities of like grade and quality and not to services; and only to goods sold for use, consumption or resale within the United States." It dose not apply to goods destined for export.

McCarran-Ferguson Act

This Act is codified at 15 USC §§101-15 and provides that the "business of *insurance*," is not synonymous with "the business of *insurers.*" The reason for the McCarran-Ferguson arose when the Supreme Court in 1948 reversed an earlier Supreme Court decision by holding that insurance was interstate commerce and therefore subject to the Federal Trade and Commerce Laws. Without intervening federal legislation, the state fabric of insurance regulation would have been irreparably torn. To avoid this perceived unintended consequence, the Congress enacted the McCarran-Ferguson Act which gave the insurance a *free-pass* permitting them to continue being stat-regulated on the condition that each state enact state Trade and Commerce Laws comparable to the Federal Trade and Commerce Laws.

Antitrust Infractions

Such infractions are classified in two ways: (a) *per se* or (b) Rule of Reason.

Per Se Infractions

These are infractions for which there is no justification and are usually found to be punishable under the law.

Examples are as follows:

1. Horizontal price fixing
2. Vertical price fixing (sometimes referred to as "resale price maintenance"
3. Bid rigging
4. Market division (customer or territorial allocation)
5. Boycotts (concerted refusals to deal)
6. Tying arrangements ("If you want X, you must also take Y").

Rule of Reason Infractions

All antitrust-violative conduct which does not consist of a *per se* offense is judged by the reasonableness of the activity. Even when an otherwise unlawful action is found, if it is also that the action is ancillary to some lawful activity and that its pro-competition consequences outweigh its anti-competition effects, the action may well be found to be a not unreasonable violation of the antitrust laws. In other words, the rule of reason involves a balancing test. There is not, for example, any *per se* rule against monopolization, or attempted monopolization. There is no "no fault" monopolization, no situation in which there is some "magic" number beyond which a firm may not increase its size or market share. The test rests on the reasonableness of

the actions which produced the final entity. Most rule of reason offenses involve a single entity, and do not usually violate section 1 of the *Sherman Act.*

Recent Department of Justice Investigation

In 2110, the Antitrust Division of the Department of Justice began investigating the possibility of anticompetitive practices that involved *most favored nation* (MFN) clauses commonly used by the large health care plans. The investigation seeks to establish that these dominant health care plans either do or do not discriminate by forcing hospitals to sign anticompetitive contracts that inhibit such hospitals in doing business with the rivals of such health care plans.

The contractual provisions under scrutiny involve the MFN practice which typically require that hospitals must charge the competitors of the dominant plans charges for hospital services that are as higher (and usually higher) than are charged to the plans. On the surface, such clause could conceivably be merely a guarantee that the best pricing is available; more often, such clauses violate antitrust laws because such practice significantly lessons competition.

Department of Justice v. Blue Cross Blue Shield of Michigan

This litigation involves the MFN clause of the Defendant. The Plaintiff alleges that the MFN clause resulted in a disproportionate increase in (a) the premiums of Defendant and also (b) the hospital charges of the hospitals not party to such MFN arrangements.

Part B – Unfair Trade Practices

In General

The Unfair Trade Practices Act was codified at 15 USC Section 15 and "prohibits methods of competition and unfair or deceptive acts" in commerce. The provisions of the Act apply to unfair methods of competition involving both interstate commerce as well as commerce with foreign nations (other than import commerce).

Healthcare Practices

It is asserted that certain current industry activities may be potentially damaging to employer-sponsored health care plans in general and to self-funded health plans in particular.

1. The activities are two in number: (a) chaotic, if not discriminatory, hospital billing Methods and (b) bundling of certain vendor services.
2. The potential damages are these: (a) plan sponsors will use such activities as one more reason and (b) to drop their plans and (c) regulators will use such activities as one more reason to intrude. Especially of concern is the increasing possibility of a single-payer scheme.

Both of the activities above-cited have the potential of being deemed an unfair trade practice which includes either or both of the following: (a) Unfair methods of competition (narrow) and (b) unfair acts or deceptive practices (broad).

Two thoughts of interest are these: (a) Such activities may violate all manner of statutory law and/or common-law without being ERISA infractions; these infractions involve civil penalties only and (b) such activities may be unfair trade acts and also restraint of trade infractions; the latter infractions may involve criminal penalties as well as civil penalties.

It is believed hat all of us whose lives are touched in some way by health care plans should respond to these words of warning as follows:

1. See that the potential for any activity being questions is eliminated. To that end: (a) Transparent hospital sticker prices should be available, hospital rating should be state-regulated because of the oligopolistic nature of the industry and a new consent to treatment agreement should be adopted as soon as possible and (b) bundling of vendor service should be used cautiously and with an abundance of consumer-alerts because of the pervasive and inherent conflicted interest problems.
2. A new audit, called a special-purpose audit should be made available which will ascertain whether or not any plan-related activity is potentially an illegal act (i.e. unfair method of competition or unfair act or deceptive practice).

A commentary follows which focuses briefly on the three major issues: (a) h ospital billing practices, (b) vendor services or (c) special purpose audit.

Hospital Billing Practices

Spate of Class Action Lawsuits

Many class action lawsuits have been filed against many hospitals nearly all of which involve tax-exempt hospitals and non-indigent uninsured persons.

1. Surrounding this litigation, we hear much ugly rhetoric (*bloated* hospitals, f*leecing* of the *unwary* patient, e.g.); hospitals appear to be responding rationally and responsibly.
2. The typical complaint alleges (a) unfair trade laws; (b) violations of letter and spirit of the hospital's IRC §501(c)(3) mandates; (c) various federal laws (Federal Emergency Medical Treatment Act, e.g.); and (d) breach of contract, unjust enrichment, civil conspiracy, concealed action, e.g.
3. It has been reported that as a result of these class action suits, the IRS is examining the tax status of some tax-exempt hospitals.
4. Conflicted interest of some hospitals, by using their billing practices as one part of their overall scheme of gaining a financial advantage with the Medicare Outlier formula, is targeted by most of these class action suits.

The economic reality is that hospitals are taking a *major hit* from the growing significance of the uninsured problem; more than or few are facing serious financial challenges at the same time being *pushed to the wall* by Medicare and the networks.

Unfair Trade Practices

By this term, we mean (a) unfair methods of competition and (b) unfair acts and deceptive practices as set forth in Federal Law (15 USC ch.2 §45) and nearly all state laws as well as common law.

The core problem is that the hospitals' billing practices appear to violate unfair trade practices using the following logic:

1. The presence of discriminatory pricing of services is apparent.
2. Any economic or cost justification therefore would be likely not be shown.
3. Therefore, the issue clearly appears to be (a) an unfair trade practice and, in addition, (b) a potential restraint of trade violation.
4. Any review by the FTC or a state office of equivalence might find some compelling reasons to not view such practice casually (conflicted interest, Medicare Outlier, charity patient reimbursement practices, e.g.).

Suggested Solutions

It seems apparent to the writer, that in light of its oligopolistic nature, the hospital industry can do one of two things at once:

1. Embrace rate regulation as a state function.
2. Make several changes to its billing systems; e.g.:
    - Transparent pricing
    - More user-friendly and meaningful consent to treatment statement.

Any idea of a longer-range solution is not rational in that the present billing systems is reported to be near collapse and needing immediate attention.

Vendor Bundling

Overview

When any of the four vendor-provided functions to a self-funded health plan are provided in combination (i.e., bundled) there exists the possibility of unfair competition as contemplated by state or federal laws. Potentially unfair trade practices exist because of the presence of conflicted interest (disclosed or otherwise) with such combinations. Where the four vendors are each freestanding, no conflicted interest is deemed possible.

If a special-purpose audit is made of the activities of the combined vendors, it may well be demonstrated that, as a result of the conflicted interest of the vendors, an unfair trade practice did, in fact occur. If such is shown to be the case, an FTC investigation might be made at the instigation of: (a) interested parties (regulators, e.g.); (b) aggrieved parties (providers, e.g.) (c) any of the four vendors not involved with, but harmed by, such alleged discrimination and (d) plan sponsors. It is important to note that plan beneficiaries are not involved in that the unfair trade practices under discussion do not typically affect plan benefits.

Unfair trade practices include (a) unfair methods of competition and (b) unfair acts or deceptive practices as contemplated by either federal or state law. It is important to note that an infraction may be either a single act or a practice. Also, such infraction may be both (a) an unfair trade infraction and also (b) a antitrust (restraint of trade) infraction. Infraction (a) is civil only; infraction (b) may be both civil and criminal.

The four vendors are the third party administrator (TPA), Utilization Review Firm/ (UR), stop-loss carrier and the Managed Care organization (MCO).

Examples of Unfair Trade Practices

Three instances of acts which would likely be deemed unfair trade practices characterized by both bundling and conflicted interest are these:

Instance Number One
The TPA is combined with an MCO which also provides its own UR services. A covered person with a serious health problem, capped by an outlier provision, presents a serious financial problem to the network hospital. The solution is to get the person's consent and by ambulance ship such patient to a non-network hospital. The stop-loss carrier will doubtless be apoplectic but it will necessarily have to pay the higher charges unless it takes action in the courts.

Instance Number Two
The TPA and the stop-loss carrier are combined and stop-loss benefits are easily manipulated by simple claims gaming. The employer likely is not aware of such activity.

Instance Number Three
The MCO, TPA, and stop-loss carrier are combined and aggressively slash the hospitals submitted charges. The hospital must acquiesce but recovers much of the cost direct by means of the Medicare Outlier and charity recovery relief.

In none of these examples would ERISA ever be a factor.

Discussion

Additional topic-related comments are as following:

1. *Producers*, while significant to the care and upkeep of the plans, do not have sufficient impact on the unfair competition aspects thereof to be a factor and therefore do not enter the critique. That is, Spitzer-type offences are not discussed in this critique.
2. Central to the writer's thesis is the following assertion:
    - With an *oligopolistic* economic environment such as hospital services.
    - Any significant unfair competition infraction.
    - That does not have an economic justification.
    - Might be deemed a violation of certain federal or state laws.
    - Unless otherwise shown to be pro-competitive by applying the rule of reason test.

3. Miscreant practices are primarily unfair methods of competition or unfair acts or deceptive practices in nature; they are secondarily (if at all) monopolistic or trade-restraining in nature.
4. *MGUs* do not gain a place in the critique because they are an extension (or alter ego) of the stop-loss carrier.

Solution

The vendors, who are bundled or in combination for plan services, have a choice between the following two options as regards the acquisition of a special-purpose audit:

- Do not acquire such audit but rather rely on their actions being immune from any challenge.
- Acquire such audit, correct/amend any instances of unfair methods of competition to the extent possible, and enjoy the comfort of a likely legal safe harbor.

Facts and circumstances will dictate the more prudent course of action in each instance.

It is the assertion of the writer that, while there are instances where conflicted interests might lead to indefensible unfair methods of competition and/or unfair or deceptive practices which would probably fail the rule of reason test, the majority of such vendor combinations are likely above reproach as respects such activities.

Special Purpose Audit

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.

Purpose

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, Stop-loss carrier, 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 an, 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

Because of the nature of the audit, professional skills not normally part of the audit team are candidates for being contributing members thereof; e.g., economists, actuaries, attorneys.

Conclusion

The Reader should be alerted to the following:

- The present hospital billing activities which might require immediate changes in some ways
- Vendor bundling activities which might require great caution because of the presence of conflicted interest.

These activities might have the potential of being:

- An unfair trade practice (i.e. an unfair method of competition or an unfair act or deceptive practice), at the least
- Additively, an illegal restraint of trade.

A special-purpose audit might needed to determine any potential infractions:

- For internal purposes
- For external or other purposes.