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New Guidelines Expand Rule of Reason, Flexible Messenger Model for Networks

FIRST IMPRESSIONS OF the new antitrust guidelines regarding physician networks have received generally favorable reviews from attorneys outside the government.

The new guidelines, released by the Federal Trade Commission (FTC) and Department of Justice (DOJ) on Aug. 28 (after press time), update and revise the expanded guidelines for the health care industry that were released Sept. 27, 1994 — The Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust. (The new guidelines will be included in the appendix of the *Health Care Antitrust* Manual next month.)

The new guidelines offer a wider application of the "rule of reason" analysis and a more flexible messenger model for multiprovider networks.

The agencies have reportedly added no new safety zones for multiprovider networks to the earlier version of the guidelines.

Changes to Statements 8 and 9

According to attorneys in the health care industry and private practice who reviewed the guidelines for comment at the request of the enforcement agencies, the bulk of the changes were made to Statements 8 and 9 in the 1994 guidelines.

Statement 8 spells out the maximum percentage of physicians in a particular specialty in a relevant geographic market who may participate in a network joint venture on an exclusive or non-exclusive basis without being challenged by the antitrust agencies.

Statement 9 allows multiprovider networks to engage in joint pricing if they share substantial financial risk through capitation or fee withholds, or through the use of a narrowly defined messenger model. The new guidelines consider global fees as a form of substantial risk-sharing, in addition to capitation. But aside from global fees and capitation, there is nothing that would garner rule of reason treatment. The agencies also consider functional and administrative integration as a proxy for economic integration in the new guidelines.

Fewer Limits on Messengers

The limits on what a messenger model can and cannot do has been eased somewhat in a way that could make the messenger model more practical and less cumbersome. Messengers may now be able to find out from providers what the minimum acceptable fee will be and bring that information to payers to facilitate the negotiation process.

Recent business review letters from the DOJ and advisory opinions from the FTC

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In This Issue

Court Reaffirms Application of Non-Profit Institutions Act to Not-for-Profit HMOs

By Jeffrey Leon

A FEDERAL DISTRICT court recently reaffirmed the vitality of the Non-Profit Institutions Act (15 U.S.C. Section 13[c]) exemption to the Robinson-Patman Act as applied to not-for-profit health maintenance organizations (HMOs). (*In re Brand Name Prescription Drug Antitrust Litigation*, 1995 WL 534,800 at 1 [N.D. Ill. No. 94 C 897, MDL 997, Sept. 5, 1995].). The decision is important to all medical suppliers that sell to nonprofit HMOs.

The issue came before U.S. District Court for the Northern District of Illinois as a motion to quash third-party subpoenas served on several HMOs that were allegedly favored purchasers of brand-name prescription drugs in the Robinson-Patman Act cases known as the Brand Name Prescription Drugs Antitrust Litigation. Several of the subpoenaed third-party HMOs filed a motion to quash the subpoenas on relevance grounds in light of their non-profit status, claiming that the Non-Profit Institutions Act barred Robinson-Patman liability for any sales made to non-profit HMOs.

Three-Part Test for Exemption

In considering the application of the Non-Profit Institutions Act to drug sales to non-profit HMOs, the court set forth a three-part test for application of the exemption. According to the court, the non-profit purchaser "must 1) be a 'charitable institution' or must fall within one of the other categories of institutions listed in the statute, 2) must not be operated for profit, and 3) must purchase the drugs 'for [its] own use.'" In *Brand Name* the court reasoned that the first two categories of the test — that the HMO be a charitable institution and that is not operated for profit — were satisfied by the HMOs' "Certificate of Incorporation and a letter from the Internal Revenue Service evidencing ... non-profit and tax-exempt status."

The third prong of the test was the focus of the court's analysis. In order to determine whether the non-profit HMOs purchased the prescription drugs for their own use rather than for sale to the public, the court relied heavily on the 9th Circuit's decision in *DeModena v. Kaiser Foundation Health Plan*, 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). The *DeModena* court applied the test developed by the Supreme Court in *Abbott Laboratories v. Portland Retail Druggist Association*, 425 U.S. 1 (1976). There, the Supreme Court, in the context of the sale of drugs to a non-profit hospital, stated that the drugs were for the hospital's "own use" when the sales are "what reasonably may be regarded as use by the hospital in the sense that such use is a part of and promotes the hospital's intended institutional operation and the care of persons who are its patients."

Applying this test, the *DeModena* court held that the sale of drugs by an HMO to one of its members falls within the basic function of the HMO because HMOs "are designed to provide a complete panoply of health care to their members."

Based on the reasoning of the courts in *DeModena* and in *Abbott*, the *Brand Name* court held that an HMO that sells pharmaceuticals to its members, but does not sell pharmaceuticals to the general public, is purchasing those pharmaceuticals for the HMO's "own use." The court thus ruled that "the relevance of the documents at issue to the individual plaintiff's prosecution of the Robinson-Patman Act claims is slight, at best, and does not justify subjecting [the non-profit HMOs] to the burdens of complying with individual plaintiffs' discovery request."

The district court later carried its decision to the next logical extent by granting the defendant's motion for summary judgment for sales made to non-profit HMOs. (*In re Brand Name Prescription Drug Antitrust Litigation*, 1995 WL 715,848 [N.D. Ill. No. 94 C 897, MDL 997, Dec. 4, 1995]). In its decision, the court reaffirmed the vitality of the DeModena decision, and characterized the plaintiffs' arguments against the validity of the DeModena decision as "tortured."

The Northern District of Illinois' decision regarding the application of the Non-Profit Institutions Act is significant to entities that sell to HMOs. A party selling to an HMO need not be concerned about the Robinson-Patman Act and should be free to meet or beat a competing price if it satisfies itself that the HMO is a charitable institution that is not being operated for profit, and that the sales being made to the HMO are for the HMO's own use and are not intended for resale outside of the HMO's membership. ▮

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