



Health Care Reform: Selected Antitrust Considerations

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Summary

The federal antitrust laws are directed at insuring that markets remain competitive, with the ultimate goal of securing consumer welfare. Antitrust is a means of governing market behavior that is, in essence, the flip side of market regulation accomplished via regulatory oversight. Accordingly, any scheme that affects the functioning of a segment of the market by prescribing or proscribing the behavior of entities that participate in that segment may impact and be impacted by the antitrust laws. That is no less a given in the health care arena than in any other. This report will set out the antitrust laws that might be of concern in efforts to reform health care markets, to indicate some of the ways in which those laws might be applicable to health care market participants, and to raise questions about the laws' applicability to market participants who act in cooperation with or at the behest of the federal government.

Restraint of trade, monopolization (as distinct from monopoly), predatory pricing, and price discrimination are among the behaviors considered unlawful under the antitrust laws; some joint activity by health care providers, therefore, could violate the antitrust statutes, especially if it impacts the prices to be paid for services—whether by purchasers (*e.g.*, health plans, health insurers) or consumers. But the federal antitrust laws are not applicable to either the federal government or, pursuant to the antitrust “state action” doctrine, to the states *qua* states; there is not, therefore, likely to be much if any antitrust consequence to actions taken by federally or state-controlled or operated entities. On the other hand, applicability of the antitrust laws to entities established by either federal or state government, but not themselves designated as government bodies, however, is more nuanced: although there is ample case law prescribing the necessary prerequisites for “state-action” immunity to be conferred on private actors at the state level, there is practically none providing guidance concerning the extent to which (or whether), and the circumstances under which, the federal government can convey *its* antitrust immunity to private actors absent a specific grant of such immunity.

Although the antitrust laws themselves are very brief and lacking in detail, there are literally hundreds of pages of case-law annotation to provide the detail lacking in the statutes. Moreover, the Department of Justice and the Federal Trade Commission have jointly issued *Statements of Antitrust Enforcement Policy in Health Care*, a document that provides specifics about the agencies' likely treatment of nine forms of collaboration by health care providers. Further, the Federal Trade Commission has responded to several queries about health care entities' plans to achieve “clinical integration,” indicating that it would not prosecute the models presented to it unless the assumptions noted by the advocates (efficiency-enhancing potential likely resulting in lowered health care costs and improved health care outcomes) did not occur.

The Commission has also asserted, however, in comments requested by state legislators on then-pending state legislation, that at least two of them (Mississippi's attempt to permit collective bargaining by health care cooperatives with health plans and New York's planned legislation to mandate/forbid certain activities by pharmacy benefit managers) would likely result in increased health care costs to consumers and/or decreased access to services.

The report will be updated as necessary as the specifics of health care reform legislation become more concrete and it becomes possible to discuss the general principles provided here in the context of specific legislative language.

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Introduction and Statutory Background

The federal antitrust laws are directed at insuring that markets remain competitive, with the ultimate goal of securing consumer welfare. Antitrust is a means of governing market behavior that is, in essence, the flip side of market regulation accomplished via regulatory oversight. Any proposed health care reform scheme, therefore, is likely to contain latent conflicts with existing federal law. There could be disagreement, for example, with the primary antitrust laws of the United States,¹ as well as the “unfairness” provision of the Federal Trade Commission (FTC, Commission) Act,² and possibly, the pricing mandates of the Robinson-Patman (R-P) Antidiscrimination Act.³

The consolidation or integration of health care entities, or other behavior by them (collusive and/or unilateral), even if prompted by or taken in furtherance of achieving some level of joint functioning deemed necessary to achieve the stated goals of health care legislation, could create cause for antitrust concern; and any of the named statutes might, depending on the circumstances of the behavior, be deemed applicable. Joint negotiation over fees or terms of reimbursement by physicians or other providers is an example of joint or collusive behavior that might implicate the antitrust laws.⁴ As then-FTC Commissioner Thomas Leary noted in a 2003 article discussing *The Antitrust Implications of ‘Clinical Integration,’* “providers have a legitimate incentive to engage in collective actions that will increase their bargaining power on issues that relate to the quality of care. [On the other hand,] providers also have a less legitimate incentive to engage in collective action that will increase their income.”⁵ To illustrate his point, Leary cites *FTC v. Superior Court Trial Lawyers Ass’n*. (493 U.S. 411 (1990)). That case is discussed in fn 6 to the CRS Report cited in note 4, *supra*.

Two Minnesota bills to authorize collective bargaining by Minnesota health care cooperatives became law despite the Commission’s negative assessment of their likely antitrust or consumer-related consequences, as did a New York measure to mandate or prohibit certain behavior by pharmacy benefit managers (PBMs). In both instances, the FTC comments were solicited by members of the state legislatures, and concluded that the likely result of passage would be an increase in health care costs and/or a reduction in insurance coverage.⁶ With respect to the proposed PBM legislation, the Commission noted that to the extent the bill “appear[ed] to try to prevent possible conflicts of interest that a pharmacy benefit manager could have in managing the

¹ Primarily, the Sherman Act, 15 U.S.C. §§ 1-7 and the Clayton Act, 15 U.S.C. §§ 12-27.

² Section 5 of the Act, 15 U.S.C. § 45; the entire Act is codified at 15 U.S.C. §§ 41 *et seq.*

³ 15 U.S.C. §§ 13, 13a, 13b, 21. Robinson-Patman makes it unlawful, absent certain justifications not here pertinent, for sellers of commodities “to discriminate in price between different purchasers of commodities of like grade and quality.” 15 U.S.C. § 13(a).

⁴ Efforts over the past several years to authorize joint negotiation by physicians with insurance providers have raised antitrust concerns. H.R. 1304, which passed the House in the 106th Congress, is discussed in CRS Report RS20410, *Joint Negotiation by Health-Care Professionals: H.R. 1304, “Quality Health-Care Coalition Act of 2000,”* by (name redacted).

⁵ 47 St. Louis U. L. J. 223, 224-225 (Spring 2003).

⁶ FTC Staff Comment Says Bills to Authorize Collective Bargaining by Minnesota Health Care Cooperatives Will Raise Health Care Costs for Minnesota Consumers, Press Release Issued March 20, 2009, available at <http://www.ftc.gov/opa/2009/03/minnesotahc.shtm>; FTC Staff Comment Says New York Bill to Regulate Pharmacy Benefit Managers May Increase Pharmaceutical Prices for New York Consumers; . . . , Press Release Issued April 3, 2009, available at <http://www.ftc.gov/opa/2009/04/nyrohmmaas.shtm>.

drug benefit program for a health plan,” it was both unwise, and probably unwarranted. The bill’s requirements, the comment noted, “will limit the ability of health plans and [PBMs] to reach cost-effective relationships. In turn, those increased costs likely will raise the cost of prescription drug coverage” without any offsetting benefit because the “perceived problems [the bill] seeks to address are not widespread.”⁷

Nevertheless, as the discussion on pages 4-5 and accompanying notes indicate, the antitrust agencies are aware that certain activities which at first glance would appear to violate the antitrust laws may be saved by the fact that they are consumer-friendly as necessary to achieve either improvement in health care delivery or reduced cost and/or greater availability of health insurance, or all of them.

Applicable Antitrust Laws: Generally

The applicable antitrust or antitrust-related provisions include sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), which prohibit, respectively, “contracts or conspiracies in restraint of trade” and monopolization or attempted monopolization; and § 7 of the Clayton Act (15 U.S.C. § 18), the so-called “anti-merger” provision; both are enforceable by the antitrust agencies (Antitrust Division of the Department of Justice, FTC), as well as by individual plaintiffs. Section 5 of the FTC Act, which prohibits “unfair methods of competition in or affecting commerce,” is enforceable only by the Commission.⁸ The Robinson-Patman Act is Depression-era legislation which, in its simplest form, prohibits discrimination “in price between different purchasers of commodities [in commerce (*i.e.*, sold across state lines)]⁹ of like grade and quality”;¹⁰ theoretically, the statute is enforceable either by the Antitrust Division or the FTC, or by disfavored private purchasers, but it has never been enforced by the Division, which has always believed that R-P fosters a pricing structure that is inflationary and harmful to consumers;¹¹ the FTC’s R-P enforcement record has been uneven. The majority of challenges under R-P, therefore, have been brought by private plaintiffs.¹² Successful private litigants who challenge antitrust legality are entitled to treble damages pursuant to section 4 of the Clayton Act (15 U.S.C. § 15);¹³ enforcement actions by the federal government requesting damages (in addition to any other

⁷ *FTC Staff Comment Says New York Bill to Regulate Pharmacy Benefit Managers May Increase Pharmaceutical Prices for New York Consumers*; ..., Press Release Issued April 3, 2009, available at <http://www.ftc.gov/opa/2009/04/nyrohmhaas.shtm>.

⁸ *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-989 (D.C. Cir. 1973): “The Act nowhere purports to confer upon private individuals, either consumers or business competitors, a right of action to enjoin the practices prohibited by the Act or to obtain damages following the commission of such acts. On careful examination of the Act and its legislative history, ... we find strong indication that Congress did not contemplate or intend such a private right of action.”

⁹ *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974).

¹⁰ 15 U.S.C. § 13(a).

¹¹ “Robinson-Patman reduces pricing flexibility, discourages the development of efficient distribution systems and frequently operates to the detriment of consumers. ... [Moreover,] Robinson-Patman is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole.” U.S. Department of Justice, *REPORT ON THE ROBINSON-PATMAN ACT* at 37, 250 (1977).

¹² For a more detailed treatment of R-P, see CRS Report R40146, *Discriminatory Pricing and the Robinson-Patman Act: Brief Background and Analysis*, by (name redacted).

¹³ Section 4 authorizes suits by “any person ... injured in his business or property by reason of anything forbidden in the antitrust laws ... and shall recover threefold the damages by him sustained.” Such actions may include those alleging violations of R-P. See, e.g., *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Kirihara v. Bendix Corp.*, 306 F.Supp. 72 (D. Hawaii 1969).

relief sought) would be brought pursuant to the authorization contained in § 4a of the Clayton Act (15 U.S.C. § 15a), which entitles the United States to the same treble-damage relief available to private plaintiffs.¹⁴

Applicable Antitrust Laws: Some Judicial and Administrative Interpretation

15 U.S.C. § 1 (Section 1 of the Sherman Act)

Activities that might violate § 1 of the Sherman Act’s prohibition against contracts or conspiracies in restraint of trade include joint activities by two or more entities such as those taken to create certain consolidated entities or those directed to joint purchasing arrangements or the pricing of health care services or medication. Since at least 1911, the courts have modified “restraint of trade” with the word, *unreasonable*. For example, in *Standard Oil Co. of New Jersey v. United States*, the Supreme Court noted:

And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which would be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus ... it follows that it was intended that the standard of reason ... was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.¹⁵

The “reasonableness” standard was emphasized again when, in 1918 the Court noting that “[e]very agreement concerning trade, every regulation of trade, restrains,” commenting that “[t]o bind, to restrain, is of their very essence,” said:

The 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. To determine th[e] question [of legality under § 1, however,] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.¹⁶

¹⁴ After some indication that the then-existing restriction on U.S. damage recovery to “actual damages” was responsible, at least in part, for the occurrence of the phenomenon known as “the United States as victim of choice” (because violations of the antitrust laws that injured the United States were less costly to violators than activities which injured private entities), section 4a was amended in 1990 (in P.L. 101-588) to allow the U.S. to sue for treble damages.

¹⁵ 221 U.S. 1, 60 (1911).

¹⁶ *Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238 (1918).

15 U.S.C. § 2 (Section 2 of the Sherman Act)

Section 2 of the Sherman Act, which is applicable to single-entity behavior, prohibits monopolization or attempted monopolization. Merely being a monopolist, or possessing monopoly power, however, does not violate the section; nor does every attempt to become a monopolist. Monopolization will not be found absent a finding of

willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.¹⁷

Attempted monopolization requires a finding of some amount of “guilty” (*i.e.*, predatory) behavior, as opposed to, *e.g.*, very aggressive competition, or behavior based on a legitimate business purpose. Moreover, there must be a “dangerous probability” that the would-be monopolist will succeed in his quest.¹⁸

15 U.S.C. § 18 (Section 7 of the Clayton Act)

Section 7 of the Clayton Act, which prohibits mergers or acquisitions which may tend to lessen competition, could be used, either by itself, to challenge the merger or joint venture activity of two or more entities or to challenge actions of the merged entity, or it could be used in conjunction with challenges to those activities as violations of sections 1 or 2 of the Sherman Act.

But Section 7, or similar provisions addressing anticompetitive practices, will not necessarily inhibit certain joint arrangements characterized as “clinical integration” between health care providers. For example, in the 1996 version of their *Statements of Antitrust Enforcement Policy in Health Care*,¹⁹ the antitrust agencies noted that “[n]ew arrangements and variations on existing arrangements involving joint activity by health care providers continue to emerge to meet consumers’, purchasers’, and payers’ desire for more efficient delivery of high quality health care services.”²⁰ And, pursuant to its Advisory Opinion policy, the Commission will consider a request for advice concerning “a course of action which the requesting party proposes to pursue,” including such requests from health care providers; and make its responses publicly available after it has responded to the requester.²¹ Requests concerning the “clinical integration” of the

¹⁷ *United States v. Grinnell Corp.*, 384 U.S. 563, 50-71 (1966).

¹⁸ *See, e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). For a more detailed treatment of monopoly law under § 2, *see* either of two CRS Reports by (name redacted): CRS Report RL33708, *The Distinction Between Monopoly and Monopolization in Antitrust Law*; CRS Report RS20241, *Monopoly and Monopolization—Fundamental but Separate Concepts in U.S. Antitrust Law*.

¹⁹ The *Statements* were initially issued, jointly, in 1993 by the Antitrust Division of the Department of Justice and the Federal Trade Commission, and superseded in 1994 to recognize additional types of arrangements in the health care market and to provide guidance concerning the agencies’ treatment of them. In 1996, the *Statements* were further modified to include recognition and discussion of a defense of “efficiencies” for arrangements that would otherwise be considered anticompetitive. The document spells out the agencies’ approach to reviewing the proposed activities of, among others, physician network joint ventures and multiprovider networks, and seven other health care-related categories (hospital mergers; hospital joint ventures involving high technology or other expensive equipment; hospital joint ventures involving specialized clinical or other expensive health care equipment; providers’ collective provision of non-fee-related information to purchasers of health care services; providers’ collective provision of fee-related information to purchasers of health care services; provider participation in exchanges of price and cost information; and joint purchasing arrangements among health care providers).

²⁰ *Statements* at 2.

²¹ The FTC Policy, set out at 16 C.F.R. §§ 1.1 – 1.4, states that responses represent “Advisory Opinions” only, and so (continued...)

practices of various physician and/or hospital providers have most frequently received positive responses.²²

15 U.S.C. §§ 13, 13a, 13b, 21 (Robinson-Patman Act)

The phrase “like grade and quality” in Robinson-Patman’s prohibition of price discrimination between different purchasers has been the subject of much litigation. But in *Federal Trade Commission v. Borden Co.*,²³ it became somewhat clearer that, at the least, the phrase does not necessarily dictate that brand-name and private-label goods are not comparable.

Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to pay for it.²⁴

In other words, the phrase most likely means the physical or intrinsic characteristics of the goods in question. In *Borden* the Court was dealing with the distinction between brand name and private-label goods, but there is no reason to believe that its reasoning would not be applicable, for example, to brand name and generic drugs sold by a single manufacturer to multiple purchasers if “the characteristics of the product[s]” were such that they are determined to be of “like grade and quality.” In addition to the “like grade and quality” requirement, however, violation of R-P also requires a price differential that may “substantially ... lessen competition.”²⁵ During the past decade or so, courts have increasingly required an adequate showing of competitive injury, and have generally found plaintiffs’ allegations of R-P violation lacking in credibility.²⁶

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are neither binding, nor preclude enforcement action in the event that is deemed to be “appropriate” and in the “public interest.” Although the FTC reserves the right to rescind its opinion, the Commission has pledged not to “proceed against ... [any] requesting part[y] with respect to any action taken in good faith reliance upon the Commission’s advice ...” (16 C.F.R. §§ 1.1, 1.3, 1.4).

²² See, e.g., Letter dated February 19, 2002 from Jeffrey W. Brennan, Assistant Director, Health Care Services and Products, Bureau of Competition, Federal Trade Commission to John J. Miles, Esq. indicating that the Commission would not challenge the proposed partial integration of individual physician practices in an association (MedSouth, Inc.), including the planned negotiation of “network” (association) contracts with third-party payers (*available at* <http://www.ftc.gov/bc/adops/midsouth.shtm>). See, also, the Press Release indicating that FTC Staff Advises Rochester Physician Organization That It Will not Recommend Antitrust Challenge to Proposal to Provide Member Physicians’ Services Through ‘Clinical Integration’ Program (September 21, 2007, *available at* http://www2.ftc.gov/opa/2007/09/clinical_integration.shtm); and a similar conclusion regarding a Maryland Physician-Hospital Organization (April 14, 2009, *available at* <http://www2.ftc.gov/opa/2009/04/tristate.shtm>). Each response relied on the Commission’s conclusions that the proposed program had “the potential to result in the achievement of significant efficiencies that may benefit consumers,” and would not likely result in an ability “to attain, increase, or exercise market power for itself or its participants ...”

²³ 383 U.S. 637 (1966).

²⁴ *Id.* at 641.

²⁵ 15 U.S.C. § 13(a).

²⁶ See, e.g., *Eon Labs Manufacturing, Inc. v. Watson Pharmaceuticals, Inc.*, 164 F.Supp.2d 350, 362 (S.D.N.Y. 2001) (“To state a claim for price discrimination, a plaintiff must allege two elements: (1) that defendants’ prices are below an appropriate measure of defendant’s costs, and (2) that there is a dangerous probability the defendant will be able to recoup its investment in below-cost prices,” *citing*, *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221-23 (1993). “Nowhere in ... the complaint, however, does plaintiff allege that the generic doxycycline was sold below cost. For this reason alone, the price discrimination claim must fail. Instead of focusing on defendant’s (continued...)”)

Although the Robinson-Patman Act prohibits unjustified price discrimination, the Nonprofit Institutions Act exempts sales made to certain at prices more favorable than those available to entities generally from the price discrimination prohibition, *if* the commodities purchased by the covered parties are “for their own use.”²⁷

In *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*,²⁸ the Supreme Court held that the phrase, “for their own use,” covers only purchases made by a nonprofit hospital for use in meeting the needs of the hospital itself (*e.g.*, dispensing medications to inpatients or outpatients treated in the hospital, emergency room use); or those of staff physicians (for use in their hospital-affiliated practices only), medical and nursing students, and the dependents of each. Although the Court specifically excluded refills for “former patients,” it recognized that part of a hospital’s treatment mission might include “genuine take home prescription[s], intended, for a limited and reasonable time, as a continuation or supplement to, the treatment that was administered at the hospital.”²⁹

In *Jefferson County Pharmaceutical Ass’n, Inc. v. Abbott Laboratories*,³⁰ the Court ruled that the Nonprofit Institutions Act did not provide an exemption for state institution “purchases [made] for the purposes of competing against private enterprise ... in the retail market”³¹ because such activity was not for the state’s “own use.” Nevertheless, the Nonprofit Institutions Act *has* been held to grant the exemption to purchases made by an HMO (health maintenance organization), even those made for resale to its members: not only does an HMO qualify as a “charitable institution,” the U.S. Court of Appeals for the Ninth Circuit has ruled that because the “basic institutional function” of an HMO is to provide a “complete panoply” of health care services, such resales are properly considered sales for the HMO’s “own use.”³² Purchases made by a state for use, *e.g.*, in its Medicaid program, presumably *would* fall within the “for their own use” restriction.³³

Insurance: McCarran-Ferguson Act (15 U.S.C. §§ 1011 – 101)

The McCarran-Ferguson Act prohibits the application of the antitrust laws and similar provisions of the FTC Act to the “business of insurance” to the extent that it is regulated by state law.³⁴ The

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costs, the gist of Eon’s complaint is that the generic was sold at substantially reduced revenues when compared to the branded drug. Although obviously a true statement, this is not illegal price discrimination.”

²⁷ 15 U.S.C. § 13c exempts sales “for their own use” to “schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.” (Emphasis added) .

²⁸ 425 U.S. 1 (1976).

²⁹ *Id.* at 15.

³⁰ 460 U.S. 150 (1983).

³¹ *Id.* at 154.

³² *De Modena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1392, 1393 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). The appeals court explained that although refilling prescriptions goes beyond “the basic institutional function of a fee-for-service hospital” (temporary medical care for patients), providing ongoing medical care, which may include filling prescriptions, is the primary function of an HMO. 743 F.2d at 1393, n. 7.

³³ No language in R-P specifically mentions “states,” but the Court has on numerous occasions stated that the words “persons” and “purchasers” in the statute are broad enough to encompass governmental bodies, including states. *Jefferson County*, itself, is one of those cases (460 U.S. at 155).

³⁴ 15 U.S.C. § 1012(b). The antitrust laws will apply, however, if it is determined that an insurance practice amounts to a boycott. 15 U.S.C. § 1013(b).

scope of the term “business of insurance” has been narrowly construed by the Supreme Court to include only those activities involving the underwriting and spreading of insurance risk³⁵ and the insurance companies’ relationships with their policy holders.³⁶ The federal antitrust laws and FTC Act probably still apply to all other activities of insurance companies, including their attempts to merge³⁷ and some of their negotiated agreements,³⁸ because the McCarran-Ferguson “exemption is for the ‘business of insurance,’ not the ‘business of insurers.’”³⁹ Under this precedent, it appears that McCarran-Ferguson generally would not prohibit the application of the antitrust laws or the FTC Act to many of the activities of an organization or a group of private companies acting at the behest of the federal government; an organization, however, deemed “an agency or establishment of the United States Government” or a private entity operating with the specific approval or authorization of the federal government, would likely remain exempt from antitrust challenge for even activities that could not be characterized the “business of insurance.”⁴⁰

Discussion

Applicability of the Antitrust Statutes; “State Action” Doctrine

The antitrust statutes are neither generally applicable to the federal government, nor, pursuant to the “state action” doctrine as articulated by the Supreme Court, to the states when they are acting *as states* (as opposed to acting as market participants in competition with private entities).

As the Supreme Court explained, as recently as 2004,

In ... *United States v. Cooper Corp.*, 312 U.S. 600, 606-607 [1941] ... this Court observed that, if the definition of ‘person’ [in the antitrust laws] included the United States, the Government would be exposed to liability as an antitrust defendant, a result Congress could not have intended, [We continue to believe that] the United States is not an antitrust ‘person,’ in particular not a person who can be an antitrust defendant,⁴¹

In *City of Lafayette v. Louisiana Power & Light Co.*, the Court emphasized that the reason for granting antitrust immunity to the states (primarily, federalism and a system of sovereign states) did not exist with respect to cities and municipalities, and that cities were, therefore, fully amenable to antitrust prosecution.⁴²

³⁵ *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 212, 220-221 (1979) (“The significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this Court in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959).”).

³⁶ *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

³⁷ *Id.* at 460.

³⁸ *Group Life & Health Insurance Co.*, *supra*, note 35, at 213.

³⁹ *Id.* at 213.

⁴⁰ See remainder of this Report for a discussion of that assertion; and see CRS Report RL33683, *Courts Narrow McCarran-Ferguson Antitrust Exemption for ‘Business of Insurance’: Viability of “State Action” Doctrine as an Alternative*, by (name redacted), which examines the case law surrounding McCarran-Ferguson in greater detail than does the brief treatment here.

⁴¹ *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736, 745 (2004).

⁴² 435 U.S. 389 (1978).

Applicability of the Antitrust Statutes to Private Entities Pursuant to the “State Action” Doctrine

The Court’s jurisprudence concerning the states’ ability to confer their “state action” immunity from federal antitrust laws to private individuals evolved during a series of decisions in the 1970s and 1980s.⁴³ For example, the first opinions in the series seemed to require that private actions be compelled by the states in order to qualify.⁴⁴ Those holdings were interspersed with others that indicated that actions taken with a state’s approval (pursuant to authorization but not compelled by a state) could likely still violate the federal antitrust laws.⁴⁵ Later decisions made it clear that so long as the actions of private, *regulated* entities are taken pursuant to a “clearly articulated” state policy, and “actively supervised” by the state,⁴⁶ there is no federal antitrust liability.⁴⁷

Conclusion: Applicability of the Antitrust Laws to Creations of the Federal Government or to Private Entities That Act Pursuant to Federal Government Command or Authorization

Notwithstanding the Court’s conclusion in *USPS v. Flamingo Industries*⁴⁸ that the antitrust laws do not, and were probably not meant to, apply to the federal government, the applicability of the antitrust laws to specific entities created by the government may remain an issue. Moreover, although there may be antitrust concerns with government participation in the market as a competitor of private enterprise; or with the antitrust legality of actions taken by private entities, either in cooperation with, or at the behest of the federal government, we are not aware of any decision that directly addresses those issues.

⁴³ The “state action” doctrine in antitrust law is generally considered to have originated in the Court’s opinion in *Parker v. Brown* (317 U.S. 341 (1943)), where, in the process of determining that a California “prorate” plan for marketing raisins did not violate the antitrust laws, the Court noted that “[t]here is no suggestion of a purpose to restrain state action in the [Sherman] Act’s legislative history.” 317 U.S. at 351.

⁴⁴ *E.g.*, *Goldfarb v. Virginia State Bar* (rates for real estate title insurance charged by attorneys), 421 U.S. 773 (1975); *Bates v. State Bar of Arizona* (attorney advertising), 433 U.S. 350 (1977).

⁴⁵ *E.g.*, *Cantor v. Detroit Edison Co.*, (utility tariff that included a free light bulb program deemed a competitive violation because there was no indication that the utility regulator would have rejected a tariff without such a program), 428 U.S. 579 (1976).

⁴⁶ *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1985), articulated the “clearly articulated/actively supervised” criteria.

⁴⁷ *E.g.*, *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48 (1985): “The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties. As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the Midcal test is satisfied”; *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992), *citing* *Patrick v. Burget*, 486 U.S. 94, 100 (1988) for the proposition that “[t]he active supervision requirement stems from the recognition that ‘[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” The internally quoted phrase is from the Court’s opinion in *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985), a case in which the actions of a state (v. private) actor were found not to require “active supervision.”

⁴⁸ *See* note 41, *supra*.

First, the way in which an entity established by Congress is characterized may determine the success of an antitrust challenge, *i.e.*, what may decide at least some issues is the way in which Congress chooses to style whatever entity is designated as a competitor to existing health plans or health insurers. Certainly, the language in *Flamingo Industries* seems to suggest that only in instances where Congress has specifically designated a corporation established by it as an agency of the United States Government (in the case of the United States Postal Service, an “independent establishment of the executive branch of the United States Government”)⁴⁹ would a court find the antitrust laws inapplicable. Instances in which Congress has chosen to create corporations which specifically are *not* agencies of the federal government, and whose actions are, therefore, amenable to the antitrust laws, include the *Regional Rail Reorganization Act*,⁵⁰ which created the National Railroad Passenger Corporation, and the *Communications Satellite Act of 1962*,⁵¹ which created COMSAT.

A second, separate but related, issue concerns the antitrust treatment of purportedly private entities working either in concert with the federal government or at the behest of the government. The first challenge on the way to deciding whether an entity is liable under the antitrust laws for behavior alleged to violate those laws may be, as one court has observed, that

[i]n antitrust cases, courts have often found it difficult to determine whether actors should be treated as public agencies or private entities. The dividing line is neither sharply drawn nor easily perceived.⁵²

With respect to instances where it has been determined that an entity acting at the behest of, if not in actual concert or partnership with, the federal government is, in fact, a private actor, analogy to the “state action” doctrine would seem to suggest that the private entity will benefit from the government’s antitrust immunity. The analog to a “clearly articulated” state policy might be Congressional (although not necessarily statutory) recognition of the beneficial aspects of certain activity. Short of legislation granting antitrust immunity to private entities, however, there could not be any categorical assurance that no court would ever find such an activity carried out by a private participant to be an antitrust violation, but there are opinions addressing challenges to state-level activities that would seem to make such an outcome unlikely. In a case in which a federal district court refused to decide in favor of an antitrust challenge to the participation of certain New York City theaters in an urban-renewal project carried out under the direction of the New York State Urban Development Corporation (UDC), the “state action” doctrine was key to the court’s reasoning. After first noting that the UDC, as a creation of the State of New York, was “exempt from antitrust scrutiny,” the court stated:

⁴⁹ 39 U.S.C. § 201.

⁵⁰ P.L. 93-236. 45 U.S.C. §§ 711(a), (c) establish the United States Railway Association as a nonprofit “government corporation of the District of Columbia subject, to the extent not inconsistent with this [act], to the District of Columbia Nonprofit Corporation Act [DC Stat § 29-301.01 *et seq.*]” The non-federal-governmental status of the agency is emphasized at 45 U.S.C. § 791, which declares that except “with respect to [certain actions taken to establish a system plan] no provision of this chapter shall be deemed to convey to any railroad or employee or director thereof any immunity from civil or criminal liability, *or to create defenses to actions, under the antitrust laws.*” (Emphasis added).

⁵¹ P.L. 87-624. 47 U.S.C. § 731 states explicitly that COMSAT “is not an agency or establishment of the United States Government”; and 47 U.S.C. § 701(c) announces that “the intent of Congress that ... the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent *with the Federal antitrust laws.*” (Emphasis added).

⁵² *Fuchs v. Rural Elec. Convenience Co-op. Inc.*, 858 F.2d 1210, 1216 (7th Cir. 1988).

It would be anomalous indeed to hold that the UDC and the City are exempt from antitrust scrutiny because they made their conditional designations pursuant to state authorization, and to hold at the same time that the developers who merely applied for and received those designations are not.⁵³

When the opinion was affirmed on appeal, the U.S. Court of Appeals for the Second Circuit expanded on that point:

For the same reasons, the private appellees acting in concert with the UDC are also entitled to state immunity. This participation was actively encouraged by the legislature. In fact, one of the fundamental goals of the Act was to have the UDC attract private investors and developers. *When the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC.*⁵⁴

More than a decade later, another federal appeals court emphasized the same point:

[R]ecognizing that the state action doctrine protects state action, not state actors, these courts reason that to allow suits against private parties for actions immunized as to municipalities would allow plaintiffs to circumvent the state action doctrine and challenge protected municipal decisions through artful pleading.⁵⁵

It seems difficult to imagine that the rationale for those cases could result in tolerance at the state level for activities that would be prohibited at the federal level.

Thus, although there appears to be little likelihood that either an organization deemed “an agency or establishment of the United States Government” or a private entity operating with the specific approval or authorization of the federal government would be found liable for violating the antitrust laws, there can be no ironclad assurance of a contrary judicial result. To the extent the legislative intent is to assure the antitrust immunization of either, it would seem prudent to correctly characterize and/or specifically immunize the entities deemed integral to the operation of a health care system.

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⁵³ *Cine 42nd Street Theater Corp. v. The Nederlander Organization, Inc.*, 609 F.Supp. 113, 119 (S.D.N.Y. 1985).

⁵⁴ 790 F.2d 1032, 1048 (2d Cir. 1986) (emphasis added).

⁵⁵ *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1500-1501 (10th Cir. 1997), *citing*, *Bloom v. Hennepin County*, 783 F.Supp. 418, 427 (D.Minn. 1992).

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