NOVEMBER 2008, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

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The Federal Trade Commission's ("FTC") powers under Section 5 of the FTC Act are often misperceived, often by the enforcers themselves. Too often in the past, the FTC has perceived itself as the younger sister of the Antitrust Division of the Department of Justice ("DOJ"), measuring its success and activities based on the enforcement agenda and approach of the Antitrust Division. There have been times when the FTC has focused its efforts, like the Antitrust Division, on federal court litigation, and in doing so, has failed to perceive and fully utilize its unique range of statutory and adjudicative powers. To its credit the current FTC has revitalized the administrative litigation process, which under its new proposed litigation rules offers the potential of the Commission becoming the "Times Square" of antitrust litigation in the future. Determining the scope of the Commission's jurisdictional powers is equally as important. That is why the FTC's recent self-examination of its powers under Section 5 is vital to effective federal antitrust enforcement.

Moreover, the nature of competition in the general economy increasingly demands that the FTC, like other enforcement agencies, fully utilize their enforcement powers. Section 5 of the FTC Act which declares illegal "unfair methods of competition"

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and "unfair acts and practices" is critically important. To give just one example, Section 5 can be used to attack facilitating practices in oligopolistic industries, which cannot be challenged under the Sherman Act. Unfortunately, because of relatively lax merger enforcement, a far greater number of markets have become oligopolistic, significantly increasing the opportunities for firms to engage in forms of tacit collusion to raise prices. Not surprisingly numerous markets have shown consistently increasing prices. The fact that the Justice Department has brought a record number of explicit collusion cases suggests that the problems of collusion are become ever more pervasive. And facilitating practices offer a convenient venue to achieve the same goals, where firms want to avoid those severe criminal penalties.

Unfortunately, since the early 1990s, the FTC has used Section 5 in a relatively modest fashion. The recent N-Data case is an important exception, but other than that case, their actions have involved invitation to collude cases. Thus, reexamination of the powers of Section 5 is vital to addressing the increasing problems in oligopolistic markets.

Healthcare is an industry which offers particular promise for sound and effective Section 5 enforcement, in particular enforcement focusing on healthcare intermediaries (i.e., health insurers and pharmacy benefit managers ("PBMs"). Enforcement efforts in this area offer the greatest potential benefit to consumers, because of the importance of healthcare intermediaries and the size of commerce involved. Healthcare, after all, accounts for one out of every seven dollars of the nation's budget. A single enforcement

action in this area may offer substantial benefits to consumers in both lower costs and greater choices.

Second, there appears to be a unique disconnect between the level of the federal antitrust enforcement and state antitrust and consumer protection enforcement. Anyone examining the federal antitrust report card involving healthcare intermediaries might reach the conclusion that these organizations are perfect antitrust citizens. The antitrust enforcement agencies have brought no enforcement cases against any healthcare intermediaries in the past eight years. Yet, anyone looking at the list of both private and state actions against these intermediaries would reach the exact opposite conclusion. For example, in the past several years:

- Each of the major pharmacy benefit managers has been sued by groups of states and the Department of Justice for fraudulent and deceptive actions that have harmed consumers and taxpayers funding federal programs. These cases were settled with penalties that exceeded $300 million. Numerous multistate investigations against PBMs continue. Moreover, there have been numerous private suits filed against PBMs for anticompetitive, deceptive, and fraudulent conduct.
- State enforcement officials, including state insurance and consumer protection enforcement officials have brought several cases against health insurance companies for a wide variety of anticompetitive and deceptive actions. In one recent case, the insurance commissioner in California imposed fines of up to $1

billion against United Healthcare, the country's largest insurance company.

The FTC should use Section 5 to challenge a variety of unfair methods of competition which undermine and threaten the integrity and competitiveness of the healthcare intermediary system. That focus should include a renewed attention to the use of Section 5 to attack practices in this area.

The problem of the failure to use Section 5 to address unfair competitive conduct in healthcare markets was highlighted when I attended and spoke at the Fifth Annual Seoul International Competition Forum earlier last month. Of course, since this was a Southeast Asia conference, we all held our breath when the representative of the Chinese antimonopoly authority spoke because we wanted to learn about how one of the world's largest economies was implementing its new anti-monopoly law.[1] Where had the Chinese focused their new enforcement power? Commercial bribery that undermined healthcare markets. The speaker noted that:

> It is found that the medical treatment, medicine, and healthcare product selling are prone to commercial bribery. Some producers and retailers, including large multinational medical medicine manufacturers have acquired, through commercial bribery, unfair transaction opportunities and sought unreasonable super-profits, which naturally results in the price hike of medicines in healthcare products, and, consequently, influences peoples' fundamental demand for seeing doctors and healthcare, causing severe side effects in the society. Thus, [the competition authority] considers the investigation and handling of commercial bribery cases in medicine, healthcare industry as top priority.

The Korean competition enforcer raised similar concerns. Their major enforcement action is a case that the Korean FTC brought against ten large pharmaceutical companies in which it imposed a fine of 20 billion won for kickbacks

[1] Ruibin Jiang, Deputy Director General, State Administration for Industry and Commerce , China, Remarks Before the Seoul International Competition Forum (Sep. 3, 2008).

including "providing undue private benefits to doctors and medical institutions, such as supporting their overseas travel expenses." The Korean FTC concluded that "the provision of undue private benefits ultimately incurs consumer damage by hampering fair competition among pharmaceutical companies and offering a cause to raise drug prices."[2]

Indeed, even FTC Commission Rosch noted that Section 5 might be an appropriate tool to use when looking at efforts that specialty hospitals engage in to cherry-pick the most attractive patients while leaving the more expensive charity-type patients for more traditional hospitals. He observed that many of the disputes surrounding specialty hospitals are over issues of fairness, and arguably are not straightforward antitrust violations; but that those types of violations fit within his own view of a potential Section 5 case.

I think it is illuminating that competition authorities around the world have decided that it is important for the *protection of consumers* and the *integrity of the market* to challenge this type of conduct—it might not be a typical antitrust violation but still threatens to undermine the competitive process.

As the Supreme Court elaborated in *FTC v. Sperry & Hutchinson* the FTC possesses broad powers under Section 5. Justice White speaking for a unanimous Court posed and answered two straightforward questions:

> The question [of the reach of Section 5] is a double one: first, does Section 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws. Second, does Section 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their

[2] Hockhyun Kim, Director General, KFTC, "Korea's Antitrust Enforcement Strategy in Medical and Pharmaceutical Markets" (Sep. 3, 2008).

> nature or quality as competition? We think the statute, its legislative history and prior cases compel an affirmative answer to both questions.
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> Legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[3]

I. CONCERNS OF HEALTHCARE INTERMEDIARY MARKETS

There are significant competitive concerns raised by health care intermediaries. Several intermediary markets are very concentrated and have significant barriers to entry. Where the practices of the intermediaries are not wholly transparent, there may be opportunities for deceptive conduct. Intermediaries can use their power to foreclose competition through a wide variety of exclusionary practices. As a series of articles in the *Wall Street Journal* observed, intermediaries have not functioned effectively in the health care context and middlemen often seem to exercise market power:

> [W]hile the Internet, deregulation and relentless corporate cost-cutting have squeezed middlemen elsewhere, the health-care middlemen are prospering. The three largest pharmaceutical benefit managers, for instance, had net income of $1.9 billion last year, a sum that exceeds the annual operating budget of New York's Sloan Kettering cancer center. In corners of the system such as Medicaid managed care and nursing-home drugs, little-known intermediaries rack up tens or hundreds of millions of dollars in profit.[4]

During the past administration, there have not been any federal antitrust enforcement actions against intermediaries, including health insurers, PBMs, and Group Purchasing Organizations ("GPOs"). There have been numerous private and state

[3] FTC v. Sperry & Hutchinson, 405 U.S. 223, 239, 244 (1972). *See also* FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966) ("[t]his broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman Act and Clayton Acts even though such practices may not actually violate these laws . . .").

4 Barbara Martinez et al., *Health-Care Goldmines: Middlemen Strike it Rich*, WALL ST. J., Dec. 29, 2006, at A1.

antitrust and consumer protection enforcement actions against these companies. As the AAI observed "[d]espite these efforts, the lack of federal enforcement results in higher prices and decreased choice for consumers."[5]

A. Pharmacy Benefit Managers

PBMs play an important function in health care markets by setting up pharmaceutical benefit networks and adjudicating pharmaceutical claims. The PBM market is highly concentrated—three major PBMs have approximately 80% of the national market. The FTC has not undertaken any enforcement activity in the face of this market consolidation. In fact, the past two substantial PBM mergers—Caremark's acquisition of AdvancePCS and CVS's acquisition of Caremark—were approved without a significant investigation, despite leading to a significant increase in concentration.

PBMs' promise of controlling pharmaceutical costs has been undercut by a pattern of conflicts of interest, self-dealing, deception, and anticompetitive conduct. The dominant PBMs have been characterized by opaque business practices, limited market competition, and widespread allegations of fraud. As a bipartisan group of state legislators noted:

> We know of no other market in which there have been such a significant number of prominent enforcement actions and investigations, especially in a market with such a significant impact on taxpayers. Simply put, throughout the United States, numerous states are devoting considerable enforcement resources to combating fraudulent and anticompetitive conduct by PBMs. This is because those activities are taking millions of taxpayer dollars and denying government buyers the opportunity to drive the best bargain for the state.[6]

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[5] THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT (Albert A. Foer ed., 2008).

6 Letter from Mass. State Senator Mark Montigny to FTC Chairman Deborah Platt Majoras (May 11, 2005).

In an important decision upholding state regulation of PBMs, one federal court observed:

> [w]hether and how a PBM actually saves an individual benefits provider money with respect to the purchase of a particular prescription drug is largely a mystery to the benefits provider." The court elaborated that "this lack of transparency also has a tendency to undermine a benefits provider's ability to determine which is the best among competing proposals from PBMs. . . . In other words, although PBMs afford a valuable bundle of services to benefits providers, they also introduce a layer of fog to the market that prevents benefits providers from fully understanding how to best minimize their net prescription drug costs."[7]

In the past four years alone, cases brought by DOJ and state attorneys general attacking unfair, fraudulent, and deceptive activities have secured over $300 million in penalties and fines against the three major PBMs. A group of state attorneys general and DOJ are continuing to conduct several investigations of the three major PBMs, and several private actions challenging their conduct have been brought by unions and other customers. The current concentration of the national full-service PBM market only exacerbates these problems, increasing the need for government enforcement and potential regulation of the industry.

Some of the problematic practices challenged in these cases include:

- secretly retaining most manufacturer payments, e.g., rebates, discounts, and other fees, instead of passing through such payments to clients;
- switching plan members from low- to high-cost drugs;
- favoring higher-cost drugs on their formularies;
- manipulating generic (maximum allowable cost) pricing;

7 Pharm. Care Mgmt. Ass'n v. Rowe, 2005 U.S. Dist. LEXIS 2339, at *7-8 (D. Me. Feb. 2, 2005), *aff'd*, 429 F.3d 294 (1st Cir. 2005).

- entering into exclusivity arrangements with specialty pharmaceutical manufacturers that raise the prices of those drugs;
- conspiring with manufacturers to violate Omnibus Budget Reconciliation Act and "best pricing" regulations; and
- committing other contract or fiduciary breaches.

One chronic problem with PBMs is that of self-dealing. Plan sponsors purchase PBM services with the assumption they are a "fair broker" that will select the lowest cost, best product on an objective basis. These concerns of self-dealing were part of the reason the FTC challenged the acquisition of PBMs by pharmaceutical manufacturers in the mid-1990s—Merck's acquisition of Medco and Lilly's acquisition of PCS. The concern was that the pharmaceutical manufacturers would favor their own drugs on the PBM formulary. These cases were resolved with orders that protected plan sponsors from the risks of self-dealing.

Unfortunately, these problems of self-dealing have continued to exist for PBMs. Almost all PBMs have their own mail-order operations. Often, PBMs may favor drugs in which they receive a greater margin because they are dispensed by mail order, even though the plan sponsor or consumer may pay more. PBMs often seek to drive consumers to more highly profitable mail-order distribution and away from independent pharmacies that offer the level of quality, advice, and personal service consumers prefer. Consumers often suffer from the conversion to mail order: they are given little choice, there is a greater chance of adverse reactions, and there is little if any consumer service. Any

consumer who has spent hours on the phone waiting for an answer on a mail-order prescription sees little "efficiency" from these efforts to drive independent pharmacies from the market. Although an FTC study appeared to find little evidence of these problems of self-dealing, the recent state enforcement actions have demonstrated that these problems are ongoing.

This problem of self-dealing has worsened with the acquisition of PBMs by major pharmaceutical chains. These chains may use the information secured through their PBM operations to target other pharmacies, by attempting to steal customers. At times the PBMs owned by chain pharmacies have attempted to deceive consumers to drive them from their rivals. Unfortunately, the FTC has failed to investigate or take any enforcement action against this anticompetitive, fraudulent, and deceptive conduct.

B. Insurance Companies

Like PBMs and GPOs, the health insurance market has the factors that make it a fertile environment for harmful conduct—concentration and complexity. Almost every metropolitan health insurance market is highly concentrated. There have been over 400 health insurer mergers in the last decade and only three have been challenged by the Justice Department—with modest divestitures. The entire nation is basically dominated by four major insurance companies.

There are a wide variety of practices that insurance companies engage in which undermine or threaten to undermine the competitive process and ultimately harm consumers. Some of these practices are similar to the practices engaged in by PBMs in

that they deprive buyers from securing sufficient information to make intelligent decisions and insure that the competitive marketplace works effectively. Other practices raise more straightforward competitive concerns by creating artificial barriers to entry and other forms of competition. Still, other practices either create or try to exploit market failures so that insurance companies can charge excessive prices or deny necessary services.

Health insurers possess a variety of tools to exercise their market power and reduce the choices of providers and consumers. For example, health insurers use "most favored nation" provisions to prohibit health care providers from entering into arrangements to sponsor new entrants into the insurance market or facilitate expansion. "All products" clauses function like tying arrangements and may be used to coerce providers to participate in particular health plan programs.

Health insurers also engage in a variety of deceptive and fraudulent practices that limit consumer choice and maintain information asymmetries. Examples of health insurer practices that harm consumers are legion, including onerous preapproval requirements and preexisting condition policies. Many insurers prevent consumer choice by imposing "gag" clauses that prevent physicians from informing patients of insurance plans providing superior coverage. Some health insurers also manipulate their claims processing systems to the disadvantage of both consumers and providers.

Let me focus on some of the more straightforward forms of harmful conduct:

- ***Most favored nations provision***. Most favored nation provisions require

healthcare providers to provide an insurer the best price that it offers any other insurer. Most favored nation provisions can raise competitive concerns because they may limit the ability of providers to engage in selective discounting, which may facilitate the entry of new providers. Moreover, in other instances, most favored nations provisions can facilitate collusion among competitors. The Justice Department and the FTC properly attacked most favored nations provisions in a series of cases during the Clinton Administration. Unfortunately, no similar cases have been brought in the past several years even though these practices continue.

- ***All products clauses***. An all products clause requires a provider to sign up for any healthcare plan sponsored by the health insurer. An all products clause effectively serves as a tying arrangement, which, again, may serve to stifle the ability of other insurers to effectively enter the market.
- ***Silent networks***. Sometimes insurance companies engage in an even more pernicious form of all products clauses — that of automatically enrolling providers in networks in which they have not chosen to participate. Not only do these arrangements create structural problems by limiting entry, but they are also unfair to healthcare providers.

II. CONCLUSION

The Congress that enacted the FTC Act created Section 5 to enable the FTC to utilize its expertise to challenge practices that were not technical antitrust violations. The FTC should begin to use those powers in a careful and prudent fashion, bringing

enforcement actions that will bring significant benefits to consumers. The FTC should start by addressing conduct involving PBMs and health insurers.