Medicaid: Fee Schedules
Anti-Trust/Unfair Trade Practices
5 MRSA § 213

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December 29, 1978

To: David E. Smith, Commissioner, Department of Human Services

From: John M. R. Paterson, Deputy Attorney General

Re: Consultations with Maine Medical Association re Medicaid Fee Schedules

The following responds to your opinion request concerning the establishment of Medicaid fee schedules.

FACTS:

The Department of Human Services, in the process of developing maximum allowances for physician services rendered to patients enrolled in the State's Medical Assistance Program, requested meetings with specialty groups of the Maine Medical Association to determine allowance dollar amounts acceptable by both the State and physicians. In preliminary discussions with representatives of the Maine Medical Association, concern was expressed that discussions of this nature may be construed as violations of antitrust law.

STATUTORY BACKGROUND:

Four major statutes, two federal and two state, prohibit the anticompetitive practices with which this Opinion is concerned. The Sherman Act, 15 U.S.C. § 1, and 10 M.R.S.A. § 1101 ("the State Sherman Act") prohibit contracts, combinations and conspiracies in restraint of trade. The Federal Trade Commission Act, 15 U.S.C. § 45, et seq., and 5 M.R.S.A. § 206, et seq., ("the mini-FTC Act") prohibit and provide for civil remedies against unfair methods of competition. Antitrust actions may be maintained under these statutes by the federal government (the Justice Department and the Federal Trade Commission), the State of Maine and private persons (under § 4 of the Clayton Act, 15 U.S.C. § 12, et seq., and under 5 M.R.S.A. § 213).

QUESTION #1:

Is the Department of Human Services in violation of antitrust law by establishing maximum allowances for the Medicaid program?

ANSWER #1:

The Department of Human Services does not violate State or federal antitrust laws by establishing maximum allowances for the Medicaid program.

QUESTION #2:

Is the Maine Medical Association in violation of antitrust law by discussing and participating in the development of maximum allowances for the Medicaid program?

ANSWER #2:

It is highly unlikely that the Maine Medical Association or any of its members who participate in discussions held at the invitation of the Department of Human Services could be held criminally liable for violation of antitrust laws absent a showing of intent either to fix prices or to exchange price information in a way which results in an anticompetitive effect on prices.

Based on the information available at the time of the opinion, and our understanding of what has occurred at meetings which have already been held, we also do not believe that civil action under the antitrust laws would be warranted. Whether civil liability under the antitrust laws might result from future discussions will depend on the nature of those discussions and any acts by Maine Medical Association members in preparation for or subsequent to those discussions.

In order to provide you with guidance, we have set forth below a general discussion of the applicable law. We also note that either the federal government or private individuals could initiate antitrust suits against the Maine Medical Association, or some of its members, for actions relating to the discussions with the Department discussed herein, even if our office did not initiate action.

REASONING:

In determining whether the Department of Human Services or the MMA are liable under antitrust laws for developing or participating in the development of maximum allowances for the Medicaid program, two separate issues must be addressed: (1) whether either party is immune from antitrust liability, and (2) if immunity does not exist, whether their activities violate antitrust laws.

1. Immunity from Antitrust Law:

A. Immunity of the Department of Human Services:

In 1943 the United States Supreme Court held that the Sherman Act does not apply to conduct of a state or of a state official. Parker v. Brown, 317 U.S. 371 (1943).* Therefore, the Department of Human Services, which is an entity of the State, would be immune from antitrust liability for establishing maximum allowances for the Medicaid program. The Supreme Court has not decided whether the state action exemption (as the Parker case is sometimes referred to) applies to the Federal Trade Commission Act. The few lower courts which have considered this question have applied the Parker doctrine to the FTC Act.** A recent staff report issued by the Federal Trade Commission also concluded that Parker does apply to the FTC Act. Presumably Maine Courts will interpret the State Sherman Act and the Unfair Trade Practices Act similarly to the interpretations given to the federal counterparts of those statutes by federal courts.

2. Immunity of the Maine Medical Association:

The question of whether the MMA is immune from antitrust liability requires consideration of a more complex issue: whether private citizens are immune from antitrust liability when they act either in concert with state officials or pursuant to a state regulatory scheme. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court held that a county bar association which promulgated a minimum fee schedule for lawyers and the state bar association which approved the fee schedule and represented that it would enforce the schedule, violated the Sherman Act. In rejecting the claim that defendants were

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* Some lower federal courts have held that the Parker decision does not apply when a governmental entity is engaged in purely private, commercial activities. See, e.g., Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (5th Cir., 1977). Moreover, the United States Supreme Court recently has held that local governments (e.g., municipalities) are not entitled to absolute immunity under Parker. City of Lafayette v. Louisiana Power and Light Co., 46 U.S.L.W. 4265 (March 29, 1978).

** However, for a contrary argument, see State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 98 Harv. L. Rev. 715 (1976).

immune from antitrust liability, the Court concluded that immunity arises only when the anticompetitive "activity is required by the State acting as sovereign." (emphasis added) 421 U.S. 773, at 780.*

One year later in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court further clarified application of the state action exemption to private persons. Detroit Edison Co., a private electric utility, provided its residential customers with light bulbs at no additional cost beyond the cost of electricity used. The Michigan Public Service Commission approved a tariff filed by Detroit Edison Co., which included the utility's light bulb program. Detroit Edison Co. was "required to continue" the program until it received permission from the Commission to abandon the program. 428 U.S. 579, at 585. The Court concluded that Detroit Edison Co., although "required to continue" the light bulb program, was not exempt from antitrust law because the light bulb program was neither related to nor a necessary component of the state's regulatory program. 428 U.S. 579, at 597-98.

The Court, therefore, appears to have established a two part test for applying the state action exemption. First, a private person cannot successfully claim immunity unless the anticompetitive activity is required by the state. Second, even if required by the state, the private person will not be exempt unless the anticompetitive activity is a necessary part of the state's regulatory effort. See City of Lafayette v. Louisiana Power and Light Co., 46 U.S.L.W. 4265 (March 29, 1978), and particularly the concurring opinion of Chief Justice Burger, 46 U.S.L.W. 4265 at 4274-4276; City of Fairfax v. Fairfax Hospital Assn., 462 F.2d 280, 285-88 (4th Cir., 1977) (concurring opinion), and Surety Title Insurance Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va., 1977). But see Mobilfone of Northeastern Pa., Inc. v. Commonwealth Telephone Co., (3rd Cir. Ct. of App., 1978) (61,873 CCH Trade Regulation Reptr.).**

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* The relevant Virginia statutes did not require fee schedules but, rather, authorized the state Supreme Court to regulate lawyers. The Virginia Supreme Court, which supervised the state bar association, mentioned advisory fee schedules in its ethical codes, but it did not require bar associations to supply fee schedules. Although the conduct of the State Bar Association (which constituted a state agency for some purposes) in approving the fee schedule was "prompted" by the Virginia Supreme Court's ethical codes, such state prompting was not sufficient to immunize the association from antitrust liability. "[R]ather, anticompetitive activities must be compelled by direction of the State" for immunity to arise. 421 U.S. 773, at 791.

** A recent staff report of the Federal Trade Commission concluded that a private party will be exempt from antitrust laws if at least two requirements are met. "The first is that the state law provide for adequate state supervisions of the regulated conduct. The second is that the regulation reflect a state policy decision rejecting competition and approving the anticompetitive practices being challenged." Report of State Regulation Task Force (FTC staff report, March 14, 1978), at pp. 10-11. This report was published prior to the decision in City of Lafayette.

Applying the approach developed by the Supreme Court in Goldfarb and Cantor, the MMA would not be immune from antitrust liability. Neither federal regulations nor state laws compel the MMA to engage in anticompetitive activity. Federal regulations establish requirements which the state must follow in establishing maximum allowances for the Medicaid program. 45 C.F.R. § 250, 30. However, those regulations do not require provider associations to play any role in the process of setting maximum levels of reimbursement.

The Maine Legislature has recently enacted legislation instructing the Department of Human Services as follows:

> "In establishing this fee schedule [for reimbursing physicians] the department shall consult with individual providers and their representative associations." P.L. 1977, c. 579, § B, § 3.

This provision does not require physicians or physician associations to consult with each other in meetings with the Department of Human Services. It only compels the Department to consult with providers. Moreover, even if § 3 was interpreted to require the MMA to consult with the Department, § 3 does not require the MMA to engage in anticompetitive activity.

The Supreme Court in Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), developed another doctrine of immunity from antitrust laws. In Noerr, the Court concluded that political activity designed "to influence the passage or enforcement of laws" was immune from antitrust liability. 365 U.S. 127, at 135.*

Noerr and the subsequent Supreme Court cases interpreting it dealt only with soliciation of government action. In Cantor, the Court found that Noerr "did not involve any question of liability or exemption for private action taken in compliance with state law," 428 U.S. 579, at 601-02, and, thus, concluded that Noerr was not applicable.**

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* In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Court construed Noerr as applying even if defendants intended to restrain competition. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1973), the Court extended Noerr to encompass solicitations to administrative agencies as well as to legislatures and courts.

** It should be noted that the section of Justice Steven's opinion dealing with Noerr was not a majority opinion, but a plurality opinion (four Justices). The FTC's Report of the State Regulation Task Force, supra, notes that the application of Noerr "when the regulatory program itself provides for input from the regulated group," presents a difficult issue. The Report concludes that Noerr was intended to protect just this very activity. The Report, however, neither cites any case law supporting its interpretation of Noerr nor mentions the analysis of Noerr contained in the Supreme Court's decision in Cantor.

The interpretation of Noerr suggested by Justice Stevens in Cantor could lead to a confusing result, in which persons would be immune from antitrust laws if they actively solicited governmental action but would not be immune if the government itself solicited the assistance of those persons. It is unlikely that the Supreme Court would sanction such a seemingly illogical result. However, until the Court addresses the relationship between the Noerr and Parker doctrines in more detail, this office cannot say with assurance whether the Noerr doctrine immunizes the MMA for discussions with the Department of Human Services held at the Department's request.

B. Antitrust Liability of the MMA:

If the MMA is not immune from antitrust law under either the Noerr or Parker doctrine, then a second issue must be reached: whether the MMA is liable under substantive antitrust law. The liability of the MMA under antitrust laws for participating in the development of Medicaid fee schedules cannot be determined in a factual vacuum. The MMA can participate in the development of fee schedules in a variety of ways. For example, the MMA would not be involved in anticompetitive activity by suggesting procedures by which the Department of Human Services could obtain historical price information from individual providers.

Generally, an agreement to fix prices constitutes a per se violation of antitrust laws, while a mere exchange of price information does not. If members of the MMA exchanged price information among themselves for the purpose of development of Medicaid fee schedules, they would not be criminally liable under the antitrust laws unless an intent to fix or stabilize prices could be demonstrated, United States v. United States Gypsum Co., 46 U.S.L.W. 4937 (June 29, 1978).

United States Gypsum suggests that different standards may apply for civil and criminal liability in cases of exchanges of price information. In that decision, the Court reaffirmed its holding in United States v. Container Corp., 393 U.S. 333 (1969) that while exchanges of price information are not per se violations of antitrust laws, proof of an anticompetitive result from exchanges of price information is all that may be needed to sustain civil liability under the antitrust laws. United States Gypsum, 46 U.S.L.W. 4937, 4944, n. 22, opinion of Justice Stevens, concurring in part and dissenting in part.

Thus, if members of the MMA exchange price information while consulting with the Department of Human Services, and if prices for private medical care stabilize at an uncompetitive level as a result of that exchange, then the members of the MMA may be civilly liable regardless of any specific intent. Moreover, if members of the MMA, while participating in developing a Medicaid fee schedule, fix prices for private medical care, those members can be liable under antitrust laws. Neither the Noerr nor the Parker immunity doctrines should be interpreted to immunize anticompetitive conduct which arises outside the scope of those doctrines.

Assuming that the MMA is not exempt under either the Noerr or Parker line of cases, then given the right set of facts, the MMA could be liable under antitrust laws for participating in developing maximum allowances for the Medicaid program. We do not know how significant the risk of liability under antitrust laws is, and by this opinion we are not suggesting the risk is large. Moreover, it should be reemphasized that the MMA can participate in establishing fee schedules by a number of means which are unquestionably lawful.

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