

DIGEST OF BUSINESS REVIEWS  
1995

95-1 Southern California Independent      2/8/95  
Lennox Dealers

Heating and Air Conditioning Services    Cooperative Advertising

Facts: The Southern California Independent Lennox Dealers (SCILD), a group of heating and air conditioning companies that sell the same brand name equipment, propose getting together jointly to advertise their products. All SCILD members would have access to all callers to a 1-800 number and would be free to compete for their business. Participation in the cooperative advertising program would not limit the pricing and territorial freedom of SCILD members, and any Lennox customer remains free to deal with any Lennox dealer.

Response: The cooperative advertising program as described should not have any anticompetitive effect. To the extent that the program provides information that reduces consumer search costs, it may have the procompetitive effect of intensifying interbrand competition. The Department has no present intention to challenge the proposal.

95-2 Intermodal Council of the American      2/22/95  
Trucking Associations, Inc.

Transportation Services                      Information Exchange

Facts: The Intermodal Council of the American Trucking Associations proposes to convene a series of discussion forums for participants in the intermodal freight transportation industry. Participants would include representatives of all members of the intermodal transportation community, including shippers, intermodal carriers, and the U.S. Department of Transportation. The purpose of the forums would be to identify industry best practices that the participants could then implement on a unilateral and voluntary basis. Freight rates and other competitively sensitive topics would not be discussed.

Response: The proposed conduct does not appear to raise risks to competition and could, by improving the efficiency of intermodal service in transportation markets, make intermodal transportation a more effective, lower cost alternative for shippers. The Department has no present intention to challenge the proposal.

95-3 Association of Independent Television      3/7/95  
Stations, Inc.

Broadcasting Services                      Information Exchange

Facts: The Association of Independent Television Stations (INTV) proposes to collect from

its members information related to the price they pay A.C. Nielsen Company for various rating services. The information will be disseminated in a manner that preserves the confidentiality of prices paid by individual member stations, and will be aggregated by station market size and format, among other characteristics. There will be no concerted use of the information by INTV members, who will continue to deal unilaterally with A.C. Nielsen Company.

Response: The proposed information exchange is unlikely to result in concerted decisions by INTV members with respect to prices paid for rating services, nor is it likely to facilitate collusion in the selling market for INTV members (here television advertising). To the extent that it increases information available to INTV members or induces new entry into the television ratings business, the proposal could result in increased efficiency and output. The Department has no present intention to challenge the proposal.

95-4 Northwest National Life Insurance Co. 3/9/95

Health Care

Information Exchange

Facts: Northwest National Life Insurance Co. (NWNL), a Minneapolis health and life insurance company, proposed to offer its internal medical claims fraud and abuse detection services to outside parties for a fee. The current inhouse fraud detection unit would become a separate division of the company, offering its services to third party payers, employers, small insurance companies, etc. NWNL would continue to process its own medical claims and deal with its own claims disputes, using the fraud detection unit as any other customer.

Response: NWNL would establish sufficient protections to assure that claims information submitted by outside clients would not be shared with NWNL, and vice versa, or among the outside clients. A nationwide data bank of medical practitioners' fraud and abuse histories would be available for use by all clients of the fraud and abuse detection unit, but only after cases were closed. The Department has no present intention to challenge the proposal.

95-5 Hillhaven Corporation/ 3/29/95  
Wisconsin Subacute Preferred Provider  
Network

Health Care Joint Venture  
Nursing Home Services

Facts: Hillhaven, an operator of nursing homes, proposed a joint venture with three other nursing home operators to offer managed care customers a statewide network of subacute-care medical and rehabilitation beds in nursing home facilities. None of the four participating firms offers nursing home services, or will offer subacute-care services, in the same local markets. Hillhaven will establish a "network price" for subacute-care services and provide a central referral process for the network, but each of the joint venturers will remain free to offer its services independently of the others, at an independently-determined price.

Response: The joint venture will enable managed care customers to contract prospectively with a single statewide network of subacute-care providers, which will compete with hospitals that offer subacute-care beds. Competition will not be affected since the four providers are not located and do not compete in the same local markets. The Department has no present intention to challenge the proposal.

95-6 Mid-South Physician Alliance, Inc./ 3/30/95  
Mid-South Health Plan

Health Care	Joint Venture
Medical Services	Physician Network Joint Venture

Facts: Physician-owned corporations proposed to create a nonexclusive physician network and affiliated HMO to provide primary care and specialist physician services within 100 miles of Memphis, Tennessee. The physician network would negotiate contracts with the HMO and other third-party payers, either on a capitated basis or under a fee-for-service schedule utilizing a "risk pool" withhold of at least 20 percent of the fees due each physician. Fees would be established by an independent consultant after gathering a variety of information from the participating physicians. No participating physician will have access to any of the information collected. The physician members will comprise no more than 30 percent of any type of primary care physician in Memphis or in any of the five surrounding counties. For all but two of the physician specialties in its panel, the Alliance will have fewer than 30 percent of area specialists.

Response: The Alliance appears to be a bona fide joint venture whose members will share substantial risk with an incentive to achieve quality and efficiency objectives. Without attempting to define precisely the boundaries of the relevant geographic market for primary care physicians or for each physician specialty, for any reasonable market the concentrations of specialists and primary care physicians expected in the network are not likely to have anticompetitive effects. Area payers view the formation of the Alliance as procompetitive since it will serve as an alternative to existing networks of providers formed by large hospitals in the area. The Department has no present intention to challenge the proposal.

95-7 Advinet, Inc.

5/12/95

Health Care

Horizontal Agreement (Misc.)

Nursing Home Services

Information Exchange

Facts: A subsidiary of the nation's largest operator of nursing homes proposed to provide a nationwide database of services offered by nursing homes and other long-term care facilities. Advinet, Inc. would contract with employers, insurers, associations and individuals to make such information available through a toll-free number. Members of the network would be encouraged but not required to provide discounts to subscribers of the service and their listings would be more detailed than those of non-members. Advinet would also assist in scheduling site visits by customers.

Response: Advinet would operate independently of its parent corporation and with a separate computer system. Its employees' compensation would not depend in any way upon selection of the parent's facilities by Advinet customers. Specific pricing information received from providers would not be made available to any other provider. This network appears to meet a consumer need and should promote competition by facilitating informed consumer choices. The Department has no present intention to challenge the proposal.

95-8 Business Travel Contractors      7/14/95  
Corporation

Airline Services                      Group Purchasing

Facts: The Business Travel Contractors Corporation (BTCC) proposes to form a joint buying arrangement to negotiate fares for air transportation services on behalf of its corporate customers. BTCC will conduct all discussions with air carriers on an individual basis and will not share information concerning one carrier's plans with any other carrier. BTCC would require that its customers commit to use its fares for at least 90 percent of their business travel on city-pair routings for which such fares are available. BTCC will limit the total number of customers that it will serve to make sure that its customers do not account for more than 35 percent of the purchases of air transportation services in any relevant market.

Response: The BTCC proposal will enhance its customers' ability to aggregate their air transportation purchases and may achieve sufficient volume to encourage airlines to offer a net fare program. BTCC's conduct would not result in anticompetitive effects unless its activities as a joint buying group accounted for so large a portion of air travel services in any relevant market that it could drive Business Contract Fares below competitive levels or foreclose other firms from a share of the market sufficient to negotiate for net fares. BTCC's proposal does not appear to pose a significant risk of such anticompetitive results, and the Department has no present intention to challenge the proposal.

95-9 Pennsylvania Orthotics & Prosthetics 7/17/95  
Enterprise

Health Care                      Joint Venture  
Medical Services                Physician Network Joint Venture

Facts: Pennsylvania Orthotics & Prosthetics Enterprise (POPE), an Individual Practice Association, proposed to form a network of Pennsylvania prosthetists and orthotists to contract with third-party payers. The network would be non-exclusive and limit its membership to 20 percent of each type of practitioner in any relevant geographic market. A management company will negotiate on behalf of the members, and sensitive information will not be shared among the members. POPE will establish a "risk pool" by withholding no less than 20 percent of each member's billings to create incentives to achieve efficiency and quality goals. The risk pool will be distributed to POPE members only if, as a group, they meet those goals.

Response: Because of its low percentages of each type of specialist in any relevant geographic market, its intention to withhold 20 percent of all fees as a means of creating shared financial risk among members, its non-exclusivity, and lack of any concerns among third-party payers, POPE is not likely to cause anticompetitive effects in the market for the provision of prosthetic and orthotic devices. The Department has no present intention to challenge the proposal.

95-10 Promotion Marketing Association 7/18/95  
of America

Coupon Rebate Programs            Information Exchange

Facts: The Promotion Marketing Association of America (PMAA) proposes to establish a centralized data base to which participating firms could report evidence of suspected coupon rebate fraud. The data base manager would collect the evidence and report its findings to law enforcement officials, and in aggregated form to its members. There would be no discussion of pricing or other sales-related conduct among the members and no cooperative utilization of the aggregated information.

Response: PMAA's proposal should not result in concerted pricing or collective refusals to deal, and may reduce prices and expand output to the benefit of consumers. The Department has no present intention to challenge the proposal.

95-11 American Society of Composers, 7/21/95  
Authors, and Publishers/  
Broadcast Music, Inc./  
SESAC, Inc.

Licensing                      Horizontal Agreement (Misc.)  
Copyright Licensing

Facts: Three music rights societies propose to engage in three types of activities--jointly discussing proposed legislation and lobbying Congress concerning the legislation, jointly discussing various issues surrounding the legislation, and jointly agreeing to certain conduct that might obviate the enactment of the legislation. The contemplated non-legislative joint discussions and joint agreements would not involve prices, market allocation, or service restrictions.

Response: Joint agreements entered into for the purpose of petitioning the Government for legislative action generally are exempt from antitrust challenge. Joint discussions, as opposed to joint agreements, do not violate the antitrust laws, although there is always the possibility that a tacit agreement might be inferred from such discussions. To the extent that the joint discussions avoid competitively sensitive areas and any agreements reached have no anticompetitive effects or minimal anticompetitive effects that are outweighed by economic efficiencies, the antitrust laws likely would not be violated. The Department has no present intention to challenge the proposed activities.

95-12 National Court Reporters Association 7/27/95

Court Reporting Services              Ethics Codes

Facts: The National Court Reporters Association (NCRA) proposes to add provisions to its Code of Professional Ethics that would require members, when making an official court record, to inform parties to litigation if such members have a contractual relationship with one of the parties to the litigation.

Response: Professional codes of ethics serve many salutary purposes, but may raise significant antitrust risks if they have the purpose or effect of restraining price or quality competition, limiting output, or discouraging innovation. Provided that the NCRA's proposed amendments to its Code follow certain guidelines set forth in the Department's business review letter, the Department has no present intention to challenge the proposal.

95-13 Hanger Orthopedic Group, Inc. 9/15/95

Health Care                      Joint Venture  
Medical Services                      Single Agent to Negotiate Contract  
Terms and/or Fees with Third-Party  
Payers



Facts: Manufacturer and distributor of orthotic and prosthetic devices, and owner and operator of over 80 orthotics and prosthetic clinics nationwide proposed to form a national network of prosthetists and orthotists to contract with third-party payers. The network will not include any competitors in any relevant geographic market. Further, it will be exclusive in relevant geographic markets where Hanger contracts with an orthotic and prosthetic clinic only if the total revenues the contracted clinic earns from providing orthotic or prosthetic services does not exceed 20 percent of the total revenues for orthotic or prosthetic services in the relevant geographic market.

Response: Since none of the members of the Hanger network will be competitors in any relevant geographic market, and since Hanger will enter into exclusive contracts with any orthotics and prosthetics clinic only where the clinic earns no more than 20 percent of total local market revenue, Hanger's network is not likely to cause anticompetitive effects. The Department has no present intention to challenge the proposal.

95-14 Metal Building Manufacturers' Association 9/29/95

Construction Trade Association

Facts: The Metal Building Manufacturers' Association (MBMA) proposes to make company certification under the American Institute of Steel Construction (AISC) Metal Building Certification Program a condition of MBMA membership. MBMA membership is not necessary to compete for metal building systems contracts, nor is membership necessary to obtain AISC certification.

Response: The proposal would not appear likely to have the effect of facilitating price collusion or reducing output and, to the extent that it promotes safety or lower costs by making compliance with the law cheaper, it should advance consumer interests. The Department has no present intention to challenge the proposal.

95-15 Halon Recycling Corporation 9/29/95

Chemicals Information Exchange

Facts: Halon Recycling Corporation (HRC) proposes to add a second halon product to the information exchange and marketing system that was the subject of a favorable business review letter by the Department on August 6, 1993. The system is intended to encourage the recovery, recycling, and transfer of halon compounds used to suppress fires and explosions. HRC's primary function is to connect potential buyers of halon with potential sellers, who then independently negotiate terms of any transaction. HRC's information exchange system does not result in competitively sensitive business information being discussed or disclosed between or among HRC members.

Response: The proposed information exchange and marketing system is unlikely to facilitate collusion or otherwise reduce competition among market participants in the purchase or sale of their products, and could enlarge the market for recycled halon, facilitating its efficient allocation. The Department has no present intention to challenge the proposal.

Health Care	Joint Venture
Medical Services	Physician Network Joint Venture

Facts: South Carolina dermatologist proposed to form a network of all South Carolina board-certified dermatologists to contract with managed care entities and third party payers, but only for those services not uniquely provided by dermatologists. The group of approximately 85 doctors (if all join) would be non-exclusive and would share substantial financial risk either by accepting capitated rates or by withholding a minimum of 20 percent of fees as a risk pool to be distributed only if certain efficiency goals are met. Inpatient hospital care and any procedure that dermatologists perform in more than 30 percent of all cases would not be covered in any contracts handled by the network.

Response: The service market would include many different types of doctors, including internists, general practitioners, family practitioners, and plastic surgeons. Based on the assumption that in any relevant local market the network's members will not exceed 30 percent of all physicians available to provide services of the type offered by the network in that market, it is not likely that they would attain market power. In addition, the group will share significant risk, provide incentives to achieve cost-containment goals, and be non-exclusive in nature. The Department has no present intention to challenge the proposal.

Health Care Information Exchange  
Biomedical Research Joint Research Project

Facts: The Southwest Oncology Group (SWOG), an association of cancer research institutions (hospitals and universities), proposed to collect data from its members regarding the cost effectiveness and resource utilization of clinical trials. Results would be made public and used in part to convince insurance companies that treatment in clinical trials is a cost-effective alternative to standard care and that therefore patients participating in such trials should not be denied insurance coverage. The association will track numbers of physician visits, laboratory tests, x-rays, nurses visits, drugs, hospitalizations, etc., and will assign costs to all treatments based on standardized data bases. Data would be collected from at least five providers and would be more than three months old at the time of analysis. Results would be stated so as to allow providers to draw their own conclusions about the cost effectiveness of any given treatment.

Response: SWOG's proposed activities involving the exchange of cost information would fall under Statement 6 of the Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust issued by the Department and the Federal Trade Commission on September 27, 1994. Statement 6 provides a safety zone for competing providers' participation in written surveys of costs or prices for health care services. There is no agreement among SWOG members to approach or negotiate with insurance companies collectively or to attempt to coerce concessions from them by taking a unified position in separate negotiations. The study promises to benefit consumers by providing information that can be used to control health care costs and ensure the most cost-effective use of health care resources. The Department has no present intention to challenge the proposal.

95-18 Georgia Preferred Podiatric Medical 11/3/95  
Network

Health Care	Joint Venture
Medical Services	Messenger Model

Facts: The Georgia Preferred Podiatric Medical Network, representing 92 of Georgia's 212 podiatrists (but open to all members of the state podiatry association, of which there are 187), proposed to employ or contract with an agent to act as an intermediary for soliciting and managing managed care contracts between the network's members and third party payers. The non-exclusive group would operate under a messenger model, transmitting terms and conditions from individual doctors to payers, and transmitting contract offers from payers to physicians, who would then decide unilaterally whether or not to accept each payer's contract offer. If payers so request, the Network may discuss with payers such potentially competitively significant non-price issues as utilization review, credentialing, and quality assurance standards, but may not negotiate such standards or terms on behalf of the members.

Response: The Network will function as a bona fide messenger to facilitate contract agreements and may facilitate the adoption of efficiency-enhancing utilization review and quality assurance procedures through non-binding discussions undertaken at payers' request. Such discussions will not be used to facilitate collusive behavior among the network's members. Non-exclusivity further ensures that competing networks can be formed and joined by members of the Network. The Department has no present intention to challenge the proposal.

Health Care  
Medical Services

Joint Venture  
Physician Network Joint Venture

Facts: Dermnet, Inc., a group of 100 dermatologists, 19 plastic surgeons, and 11 dermatopathologists, proposed to offer tailor-made panels of specialists to provide skin treatment services to managed care groups and other third-party payers in Dade, Broward, and Palm Beach counties, Florida, through a single agent. The group will share risk through capitation, but would begin operations by contracting for capitated rates with a certain percentage of standard Medicare reimbursement levels guaranteed. After approximately six months, contracts with payers would be fully capitated. The group will establish quality assurance, utilization review, and credentialing rules and standards and will be non-exclusive in nature, allowing its members to join or continue their present participation in other networks.

Response: Dermnet's members will share significant risk through capitation. While the group will represent 43.5 percent of board-certified dermatologists in the tri-county area, its ability to acquire market power in any relevant geographic market will be limited by its non-exclusivity and the presence of other similar networks. Payers did not believe that their ability to contract with dermatologists would be adversely affected by the creation of Dermnet. The group would raise no competitive concern with respect to plastic surgeons since it represents only 12.5 percent of the board-certified plastic surgeons in the area, and its membership would not exceed 30 percent of all plastic surgeons in any reasonably drawn market. While eleven of the fifteen dermatopathologists in the tri-county area will be Dermnet members, payers can and do use dermatopathologists significantly beyond the tri-county area and are not concerned by Dermnet's large panel. The Department has no present intention to challenge the proposal.

Health Care                      Joint Venture  
Clinical Laboratory Services

Facts: The Preferred Laboratory Access Network (PLAN), a group of 17 small and mid-sized independent clinical laboratories in California, proposed to form a network to compete with several large national laboratories for regional managed care laboratory services contracts, particularly those to be let by the California state medicaid system, MediCal. PLAN membership will be open to all clinical laboratories, but it will be limited so that it will account for no more than 30 percent of the laboratory sales volume for any relevant market. PLAN intends to share risk by operating primarily using capitated rates; on those rare occasions when a fee-for-service contract is sought, rates will be set using a messenger model to avoid any agreement as to price by member labs. When not bidding for large regional contracts, members of PLAN will continue to compete with one another for traditional laboratory business, which is expected to comprise the majority of PLAN members' revenue for the foreseeable future.

Response: In the markets for "stat" tests (blood counts, throat and urine cultures and other tests that require very quick turnaround) and "routine" tests (those that are generally uncomplicated and widely used but not particularly time sensitive), PLAN members compete with other independent clinical labs and hospital labs. To the extent that PLAN members provide esoteric or exotic tests (those requiring more sophisticated lab procedures or equipment and usually not time sensitive), they compete with reference labs throughout the country. While the market share information provided was limited and necessarily inexact, the combined market shares were sufficiently low to indicate that PLAN's members, as a group, would not possess potentially anti-competitive levels of market power. Furthermore, PLAN will operate in a nonexclusive manner, and payers and California state government officials all agree that competition in lab markets is fierce. The presence of three large national labs in the primary target area for MediCal HMO contracting offsets any market power that these 17 smaller labs might command. In addition, there are many other independent labs available to create similar networks, and hospital labs also provide competition in local markets. The Department has no present intention to challenge the proposal.