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Consumer News

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Consumer News

Federal Government Moves To Combat Doctors' Self-Dealing

As the nation begins to focus on health care, new attention is being paid to the volume of tests and treatments which physicians prescribe. Many critics of our health care system contend that too many tests are performed and that in some cases, excessive treatment is prescribed.

Physicians prescribe so many tests and treatments for a number of reasons. Physicians have an incentive to order extra tests to defend themselves against future malpractice claims. In addition, as medical technology advances more tests and treatments are available. Finally, due to our aging population, the demand for medical services of all kinds has grown.

As more doctors invest in laboratories and treatment centers, they may have an extra incentive to prescribe special tests and treatments for their patients. Many doctors argue that their investment activity generates the capital needed for expensive and sophisticated testing equipment, such as magnetic resonance imaging machines. Critics, however, suggest that there is a clear conflict of interest for doctors who own the testing facilities to which they refer their patients.

The U.S. Inspector General conducted a study covering eight states which found that "on average, physicians involved in joint ventures order more tests or services for their medicare patients," and that those patients are "charged more for such services." Last year, the Florida Health Care Cost Containment Board ("Board") commissioned a survey of 2,200 clinics statewide to study the impact of physician ownership in medical testing ventures.

The Florida study revealed that 45 percent of the physicians licensed in that state had invested in medical joint ventures to which they could refer their patients for

testing or treatment. The study also indicated that doctor-owned joint ventures "perform more tests per patient, have higher charges and provide a lower quality of services" than other laboratories.

Following the Board's report, the Florida legislature passed the Patient Self-Referral Act ("Self-Referral Act"). Under the Self-Referral Act, doctors who have invested in medical joint ventures have until October, 1995 to cease making referrals to facilities in which they continue to have a financial interest.

On a national level, the Federal Department of Health and Human Services adopted new rules designed to discourage doctors who are paid through Medicare and Medicaid from investing in the facilities to which they commonly refer their patients. In addition, Congress enacted new legislation, effective January 1, 1992, barring doctors who have a financial interest in a clinical laboratory from referring their medicare patients for tests to be performed by the laboratory.

The federal legislation, however, only addresses self-dealing with respect to clinical laboratory tests. Some groups have suggested that the scope of this new law should be expanded to cover referrals for physical therapy and radiation treatment as well. The Florida report indicates that physicians also own treatment centers to which they refer their patients for such treatments as physical therapy or radiation.

Impact of Solomon Scandal on Consumers

The recent treasury auction scandal, in which Solomon Brothers ("Solomon") played a leading role, illustrates how unethical conduct in financial markets may impact consumers. The scandal turns on allegations that Solomon manipulated the prices of United States treasury securities sold at monthly auctions. Activity at the

monthly treasury auctions sets the interest rate the government will have to pay on treasury securities, affecting consumers in at least two ways.

First, the interest rate on treasury securities influences other interest rates throughout the economy. Because treasury securities are backed by the full faith and credit of the United States Government, they are considered the safest securities available.

The interest rate on treasury securities provides the floor for all other interest rates throughout the economy, from home mortgage rates to the prime rate paid by corporate borrowers. For example, as the prevailing interest rate on treasury notes goes up, the prevailing home mortgage rate is likely to go up.

Furthermore, the interest rate on treasury securities impacts the government's ability to reduce the deficit. The United States government finances its deficit by selling treasury securities at periodic auctions. Generally, when the interest rate on securities goes up, the price goes down. The government realizes less cash to apply toward the deficit and incurs more interest liability, making the deficit larger.

Solomon allegedly manipulated prices at monthly auctions for treasury securities held by the United States government. These auctions are sometimes known as the primary market because the government only sells directly to 40 primary dealers, who in turn sell to the public in what is known as the secondary market. Solomon Brothers is one of the 40 primary dealers. The primary dealers, through the bidding process at treasury auc-

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tions, determine the discounted price of a bond and the interest rate paid by the government.

Solomon has already admitted that it influenced prices of securities at treasury auctions. No single primary dealer is permitted to buy more than 35 percent of the total amount of securities offered at an auction. Solomon bought far more than 35 percent by first buying in its own name, and then buying in the names of customers who had not ordered the securities and were not aware of the purchases.

Solomon also revealed that at an auction last May, it controlled as much as 94 percent of the notes offered for sale. As a buyer, Solomon would, if it could, want to purchase at the lowest price possible. By controlling large percentages of securities offered at auctions, Solomon could drive the price down, thereby driving the interest rate up.

If a primary dealer is able to push the price of a treasury note down and the interest rate up, all other interest rates throughout the economy will most likely go up. Furthermore, a single primary dealer in control of the market, could make the federal deficit larger.

In response to the recent scandal, Representative Edward J. Markey (D-Massachusetts) charges that "[a] few individuals at the top of the American financial pyramid have been playing games with the taxpayers' money." Markey has been pushing for new stricter regulations on the markets for treasury securities.

To the extent that Solomon was able to occasionally buy more than 90 percent of an issue, the firm could also possibly influence the secondary market, impacting consumers as investors. Primary dealers, who buy at the monthly auctions, in turn sell those securities to mutual funds and pension funds in what is known as the secondary market.

Treasury securities are popular among institutional investors because they are risk-free. In the secondary market, Solomon, as a seller, would want to sell at the highest price possible, diminishing yields for institutional investors.

However, many analysts think the recent scandal had virtually no

effect on the secondary market. Although Solomon could conceivably control the price of those issues for which it dominated the primary market, the secondary market is extremely large and also includes investors buying and selling to each other.

According to David Bowers, head of the banking and finance department at Case Western Reserve University, "Solomon's transgressions didn't strike at the foundation of the market." Analysts, like Bowers, point out that because of the burgeoning federal deficit, the entire secondary market is approximately \$3.5 trillion in outstanding debt, while an average auction of 2-year notes is approximately \$12 billion.

Nevertheless, the recent scandal has sparked a flurry of new regulatory activity. In January, the Treasury Department, which oversees the auctions, announced its proposal for changes in the auction process. The proposal reflects the recommendations contained in a simultaneously released report on the government securities market prepared by the Treasury Depart-

ment, the Federal Reserve Board, and the Securities and Exchange Commission.

The proposed changes include a new "single price" pricing process designed to discourage collusion and permission for individual investors to participate in auctions. In addition, more firms would be encouraged to apply for primary dealer status under new eligibility requirements.

FDA Showing Concern Over Promotion of Prescription Drugs

Recently, the Food and Drug Administration ("FDA") has indicated that it will scrutinize promotional schemes for prescription drugs much more closely than it has in the past. In addition to approving the sale and distribution of drugs, the FDA has regulated drug advertising since 1962. Since then, industry advertising has grown more diverse, and the FDA is moving to control drug marketing in several arenas, including promotion of prescription drugs to consumers.

The FDA and Congress are both looking at one particular technique used to promote prescription drugs to consumers, the video news release ("VNR"). VNRs are "news" segments which drug companies produce and provide to local television stations free of charge. Drug companies or their public relations firms hire physicians to star in the video segments and often provide the television stations with scripted lead-ins to be used by newscasters.

In some cases, the VNRs contain blank audio and visual portions into which a local station may tape its newscaster asking scripted questions. Viewers are lead to believe they are watching an interview even though no conversation has actually taken place.

The Senate Labor and Human Resources Committee, chaired by Senator Edward Kennedy, began investigating VNRs last year. Eugene Secunda, assistant professor of marketing at Baruch College in New York City, testified that VNRs "are meant to deceive in the sense that they do not represent them-

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ANNOUNCEMENT

Conference on Food Labeling Guidelines

The Food Processors Institute, the education and training branch of the National Food Processors Association, will be hosting a conference November 16-18 on how to comply with the new federal requirements for food labeling. At the conference, expert speakers will clarify the final rules promulgated by the Food and Drug Administration and the Department of Agriculture.

For more information, contact Rita Bahner, executive director of the Food Processors Institute. (202-639-5900).

Recent Cases

Tenth Circuit Holds That Statute Regulating Alcohol Content Advertising Does Not Necessarily Violate The First Amendment

In *Adolph Coors Company v. Brady*, 944 F.2d 1543 (10th Cir. 1991), the United States Court of Appeals for the Tenth Circuit held that alcohol advertising and labeling are commercial speech protected under the First Amendment and, when restrained, require a balancing between the interests of the public and the government.

Facts

In 1987, Adolph Coors Company ("Coors") requested approval from the Bureau of Alcohol, Tobacco, and Firearms ("Bureau") for labels and advertisements that would disclose the alcohol content of Coors and Coors Light beer. The Bureau denied Coors's request because the Federal Alcohol Administration Act ("the Act"), 27 U.S.C. 205(e)(2) and (f)(2), prohibits labels or advertisements that disclose the alcohol content of malt beverages unless otherwise authorized by state law.

District Court's Opinion

Coors sued the Bureau and the United States Treasury in the United States District Court for the District of Colorado. Coors claimed the Act violated its rights under the free speech clause of the First Amendment because the Act prohibited Coors from disclosing truthful information regarding the alcohol content of its products. Coors requested that the district court overturn the Bureau's disclosure denial and declare 205(e)(2) and (f)(2) of the Act unconstitutional.

The Treasury admitted that these sections were unconstitutional under the First Amendment. Consequently, the Speaker and Bipartisan Leadership Group of the

United States House of Representatives ("the House") intervened in the action to defend the constitutionality of the Act.

The district court concluded that the sections constituted an illegal restraint on commercial speech under the First Amendment. In addition, the district court found 205(e)(2) and (f)(2) of the Act unconstitutional and barred the Bureau from enforcing the sections. The Treasury and the House appealed the decision to the United States Court of Appeals for the Tenth Circuit.

Tenth Circuit's Opinion

The Tenth Circuit reversed the district court's ruling because it found a factual dispute existed as to the issues. In its determination of constitutionality, the appellate court used a four-part test outlined by the United States Supreme Court in *Central Hudson Gas v. Public Serv. Comm'n.*, 447 U.S. 557 (1980). This test applies to regulations that limit commercial speech and which allegedly violate the First Amendment. The *Central*

Hudson test states that a statute is constitutional if: (1) the expression being regulated is protected by the First Amendment; (2) the government interest in the regulation is substantial; (3) the regulation directly advances this interest; and (4) the regulation is not overly restrictive.

First, the appellate court noted that the Supreme Court has recognized advertising and product labeling as commercial speech. Under the first part of the *Central Hudson* test, this speech is protected under the First Amendment if it involves lawful activity and is not misleading. The appellate court stated that, because the proposed advertising and labeling involved a legal activity under federal law and was not misleading, it was protected under the First Amendment.

The second part of the test requires that the government's interest in regulating the disclosure of alcohol content in advertising and product labeling is substantial. The appellate court determined that the government had a substantial and legitimate interest in the regulation because it prevented unfair competition and protected the consumer.

In finding a substantial government interest, the court accepted the government's argument that a prohibition on the disclosure of the alcohol content would prevent "strength wars" in the brewing industry. In other words, the statute alleviated pressure on brewers to produce beer on the basis of an increased alcohol content. Additionally, the appellate court found Coors's admission that it wanted to display the alcohol content of its product to overcome the product's image of being a weak beer illustrative of this concern. Thus, the court maintained that a restriction on disclosure would result in the production of lower alcohol content beers, thereby protecting both the industry and the consumer.

Next, the appellate court determined that the district court had not addressed the question of

ANNOUNCEMENT

Consumers Satisfied with Air Bags

Consumers appear to be relatively satisfied with air bags according to two time-honored tests. People are not suing over air bags, and they are not complaining about them either.

The big three American automobile manufacturers currently have sold more than 6 million cars with air bags. They are defendants in only about 60 lawsuits over air bags, only one of which concerns a fatality.

Furthermore, of 200,000 alleged safety defects reported to the National Highway Traffic Safety Administration's safety hotline, only 370 complaints concerned air bags.

Finally, since 1987, there have been recalls of only 10,543 air bags compared to 4.7 million seat belts. All of these statistics indicate a spectacular track record of reliability of air bags.