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Health Care Costs Continue Steady, Steep Climb

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manufacturers.⁶² Although it has not been officially announced, it is widely believed that Micron has already negotiated immunity in exchange for its cooperation with the government.⁶³ The status of the investigations of the two largest DRAM manufacturers, Samsung and Hynix, remain open questions.

Judgments against Samsung and Hynix could lead to a massive high-stakes legal battle between chipmakers and computer manufacturers. Most individual consumers, however, are unlikely to recover anything for the higher prices paid for personal computers. Under *Illinois Brick Co. v. Illinois*, only overcharged direct purchasers, with some exceptions, are entitled to damages under the federal antitrust law.⁶⁴ While some states have antitrust laws that provide a private right of action for indirect purchasers,⁶⁵ the prospect of recovery for most individual consumers appears bleak. Still, to the extent that government and private actions under federal antitrust law deter companies from conspiring to fix prices in the future, individual consumers can claim victory.

Health Care Costs Continue Steady, Steep Climb

Health insurance premiums increased more than eleven percent this year, the fourth consecutive year in which consumers have seen their premiums increase by double digits.⁶⁶ The average cost to insure a family of four is now nearly \$10,000 a year, up sixty percent from 2001.⁶⁷

Industry analysts suggest that advances in medical technology and prescription drugs are driving the increase, and that by addressing unhealthy lifestyles costs can be controlled.⁶⁸ Others

⁶² *Id.*

⁶³ Clark, *supra* note 57.

⁶⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁶⁵ WILLIAM MEADE FLETCHER, *FLETCHER ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 5062.35 (2004).

⁶⁶ Rob Kaiser, *Health Premiums Soar*, CHI. TRIB., Sept. 10, 2004, at A1.

⁶⁷ *Id.* (quoting Drew Altman, president of the Kaiser Family Foundation, "I see no scenario other than health-care costs continuing to outdistance wage increases and inflation by a very wide margin").

⁶⁸ *Id.*

blame the high costs, at least in part, on the fact that consumers are directly responsible for paying only one dollar out of every six dollars spent on health care.⁶⁹ They argue that consumers have less incentive to seek out low-cost high value health care when insurers are footing the bill for even routine care.⁷⁰

Not surprisingly, employers faced with soaring healthcare expenses and an uncertain economy have scaled back or eliminated their participation in employee coverage plans. The number of uninsured Americans rose to 45 million last year, up 1.4 million in the last year.⁷¹ Consumers who were accustomed to simply signing up for their employer-sponsored health care plan are being forced to make important and complex health care buying decisions on their own. Increasingly, consumers are falling victim to unethical sales tactics and outright fraud.

In the last two years, the state of Florida has shut down 200 "fake" insurance operators.⁷² This year alone, Montana has issued fifteen cease and desist orders against companies selling discount plans for as little as \$89.95 a month without even inquiring into the consumer's medical condition or history.⁷³

Nationwide, it is estimated that five of the most aggressive of the fraudulent insurers have left more than 85,000 consumers with at least \$85 million in unpaid medical bills.⁷⁴ Health care fraud cost

⁶⁹ Glenn Hubbard, *A Prescription for Health-Care Reform*, BUSINESSWEEK, Sept. 20, 2004, at 28. See also *Improving Health Care: A Dose of Competition*, Dept. of Justice and the Federal Trade Commission, available at www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf (Jul. 2004). In 2002, health care spending in the United States was equal to approximately fourteen percent of the gross domestic product, or 1.6 trillion dollars. *Id.* Federal, state and local governments pay approximately forty-five percent of this amount; private insurers pay forty percent; and consumers pay the remaining fifteen percent directly to health care providers. *Id.*

⁷⁰ Hubbard, *supra* note 69 (proposing tax deductions for consumers who elect insurance plans with high deductibles).

⁷¹ Kaiser, *supra* note 66.

⁷² Brian Grow, *It's Enough To Make You Sick*, BUSINESSWEEK, Sept. 13, 2004, at 58.

⁷³ *Id.* In California, a law suit is pending against an insurer and the company's marketing agent for selling a policy to a cancer survivor which, in fine print, capped coverage for chemotherapy at \$1,000 per day. When the cancer returned chemotherapy costs ran as high as \$18,000 a day, leaving almost \$500,000 in unpaid medical bills at the time of the policyholder's death. *Id.*

⁷⁴ *Id.*

consumers \$54 billion in 2003, and this figure, like the cost of legitimate health care insurance, appears likely to increase in the years ahead.⁷⁵

In July, however, the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) released the results of an extensive study which offers a ray of hope.⁷⁶ The report suggests that much of what ails the healthcare marketplace can be cured with a healthy dose of competition.⁷⁷

Historically, healthcare has been viewed as a special marketplace in which normal economic forces should not be allowed to operate.⁷⁸ In the vast majority of markets rivals compete for consumers, and consumers actively make decisions based on the price and quality of the available products.⁷⁹ Competition generally provides lower prices and broader access to products and services, while at the same time promoting quality and innovation.⁸⁰ Competition, however, can be “quite unpleasant” for competitors.⁸¹ The idea of health care providers ruthlessly fighting off competitors seems at odds with the trust and compassion that consumers expect from their health care providers.⁸² Yet, in this study, the DOJ and FTC suggest that it is not increased regulation, but increased competition that has the potential to stem rising costs, and improve the quality of the health care available to consumers.⁸³

The report’s recommendations for increasing competition in

⁷⁵ Grow, *supra* note 72, at 58.

⁷⁶ Dept. of Justice and the Federal Trade Commission, *Improving Health Care: A Dose of Competition*, available at www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf (Jul. 2004). This two-year study included 27 days of hearings in which approximately 250 experts in healthcare, economics, and antitrust law testified, generating nearly 6,000 pages of transcripts. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Department of Justice and the Federal Trade Commission, *Improving Health Care: A Dose of Competition*, available at www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf (Jul. 2004) [hereinafter *Improving Health Care*].

⁸² *Id.* at 2.

⁸³ *Id.*

the health care marketplace include:

*High deductible payment structures and increased access to information.*⁸⁴ The idea here is that high deductibles will increase consumers' incentive to research available medical options. If consumer incentive is combined with access to reliable and understandable information on the price and quality of medical services, consumers will naturally become increasingly smart shoppers for health care services. Incentive and information should, in turn, lead to an increasingly consumer friendly marketplace.

*States should reduce barriers to entry for out-of-state providers.*⁸⁵ When potential suppliers to a market are locked out of the market by state-particular regulation, the result is patently anti-competitive. Uniform licensing standards with reciprocity agreements between states, would allow health care supply to flow across state lines according to consumer demand, resulting in a more pro-competitive health care market place.

*Governments should not enact legislation that excludes physicians from otherwise applicable antitrust laws.*⁸⁶ Collective bargaining agreements between physicians are akin to price fixing cartels. These agreements limit competition and have not been shown to improve the quality of physician services.

Whatever the merits of these recommendations may be, however, neither political party appears committed to aggressive health care reform.⁸⁷ Although President Bush suggests that private sector competition will help control Medicare costs, he has yet to support the pro-competitive measure of opening U.S. borders to

⁸⁴ *Improving Health Care*, *supra* note 81, at 21.

⁸⁵ *Id.* at 23.

⁸⁶ *Id.*

⁸⁷ See Sarah Lueck, *Deft Political Hand Reshapes Health-Insurance Behemoth*, WALL ST. J., Sept. 28, 2004, at A4 (observing that the presidential candidates "show no appetite" for radical health care reform, and suggesting that President Bush believes he has already "fixed Medicare. . .").

prescription drug imports.⁸⁸ While an infusion of competition may provide some hope for the future, a solution to the rising costs of health care seems unlikely anytime soon. For at least the short term, health care consumers should be prepared to keep reaching a little deeper into their pockets.

⁸⁸ Jill Dougherty, *Bush Mulls Importing Prescription Drugs*, CNN, at www.cnn.com/2004/ALLPOLITICS/08/18/bush.drugs/index.html (Aug. 18, 2004).
