

Set Aside Order

120 F.T.C.

IN THE MATTER OF

CALIFORNIA MEDICAL ASSOCIATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2967. Consent Order, April 17, 1979--Set Aside Order, Oct. 27, 1995*

This order reopens a 1979 consent order, which prohibited the medical association from participating in the creation or dissemination of fee schedules relating to physician compensation, and sets aside the consent order pursuant to the Commission's determination that the public interest requires reopening and setting aside the order because the order presents an obstacle to the respondent forming and operating a managed care subsidiary.

ORDER GRANTING PETITION TO REOPEN AND MODIFY
OR SET ASIDE CONSENT ORDER

On May 24, 1995, California Medical Association ("CMA"), filed its Petition To Reopen and Modify or Set Aside Consent Order ("Petition") in Docket No. C-2967, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In its Petition, CMA requests that the Commission reopen the order and set aside or, in the alternative, modify provisions of the order that restrict the ability of CMA to develop and distribute a relative value study ("RVS"), as defined in the order.

CMA asserts in its Petition that changed conditions of law or fact warrant reopening the order and setting it aside or modifying it. The Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by CMA of relative value studies had the effect of establishing, maintaining or otherwise influencing the fees which physicians and other health care professionals charge for their professional services. The order, among other things, prohibits CMA from "directly or indirectly initiating, originating, developing,

publishing, or circulating the whole or any part of any proposed or existing relative value study." *In re California Medical Association*, 93 FTC 519 (1979).¹ In 1985, in response to CMA's Request to Reopen Proceeding and Modify Order ("1984 Petition"), the Commission amended the order so that it would not prevent CMA from petitioning state or federal government agencies and participating in federal or state administrative or judicial proceedings and providing information or views to third party payers concerning any issue, including reimbursement. *See* Order Reopening and Modifying Final Order In Docket No. C-2967 (issued April 19, 1985) ("Order Modifying Order"), at 4.

II. THE PETITION

CMA requests that the Commission reopen the order and set it aside or modify it. CMA seeks relief from the order's prohibition against developing and distributing RVSSs because CMA would like to participate, with its member physicians, in forming and operating a statewide managed care subsidiary to offer "comprehensive health maintenance services . . . to enrolled individuals in California on a pre-paid basis" Petition at 3.² CMA states that it must be able to develop and distribute a reimbursement schedule to compensate physicians and other health care providers who contract with the managed care subsidiary. In addition, CMA asserts that the order must be modified or set aside so that CMA can transmit price and reimbursement information between physician-members of CMA's network and health care purchasers in connection with a messenger model contracting approach.

CMA also asks the Commission to set aside the order or add two new provisions to the order to resolve perceived uncertainty about

¹ The order defines "relative value study" to mean:

. . . [A]ny list or compilation of medical procedures and/or services which sets forth comparative numerical values for such procedures performed and/or services rendered by physicians and other health care providers, without regard to whether those values are expressed in monetary or non-monetary terms.

Order, ¶ I.A., *Id.* at 522

² CMA states that physicians participating in the managed care organization will share substantial financial risk, except to the extent that CMA is operating a messenger model network, and that the proposed organization will not inhibit new entry. The Petition notes, among other factors, that physician participation will be non-exclusive, so that participants will be free to join other managed care organizations; that CMA anticipates that fewer than 30% of physicians practicing in California will participate in the organization; and that numerous other competing plans with large provider networks currently exist in the market. Petition at 24-25.

CMA's ability to collect information and data from and transmit information and data to government agencies, third party payers, and its own members. CMA does not describe specific conduct in which CMA wishes to engage but asserts that "it is unclear" if certain hypothetical conduct might be prohibited by the order.

CMA's Petition is based on alleged changes of fact and law that CMA argues warrant reopening the order under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and either setting the order aside or modifying it. CMA contends that the order "severely impairs CMA's ability to establish a subsidiary company to sell managed care services in California's highly competitive healthcare market." Petition at 3. If the order is not set aside, CMA proposes the addition of a proviso to the order that specifically authorizes CMA to distribute information regarding fees that CMA will pay to physicians who participate in CMA's managed care network. Petition at 26. CMA also seeks an order modification that would permit CMA to use a messenger model approach to contracting. Letter from Martin J. Thompson of Riordan & McKenzie to Arthur M. Strong, Staff Attorney, Federal Trade Commission (August 15, 1995). Finally, CMA proposes provisions to the order that would address CMA's communications with government agencies, third party payers, and health care purchasers. Petition at 26-27.

III. STANDARD FOR REOPENING A FINAL COMMISSION ORDER

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require

reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (1979-1983 Transfer Binder) Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality.)

IV. THE ORDER SHOULD BE REOPENED AND SET ASIDE

CMA has shown that reopening and setting aside the order is warranted in the public interest.³

The order's prohibition against the development or distribution of physician reimbursement schedules or other RVSS by CMA presents an obstacle to CMA forming and operating a managed care subsidiary. Without a reimbursement schedule, CMA would be unable to compensate physician-members of its proposed provider network. The order, therefore, inhibits conduct that is necessary for CMA to participate in the managed care market.

CMA's formation of a managed care organization is not inherently illegal, and may be procompetitive. This order was intended to inhibit the distribution of RVSS that might facilitate price-fixing by CMA's members. It was not intended to inhibit lawful entry by CMA into managed care markets. Accordingly, the order should be set aside. *See also* American Academy of Orthopaedic Surgeons, Docket No. C-2856, Order Setting Aside Order.

The order's prohibition against distributing RVSS and other fee information to physicians is at the heart of the order.⁴ The danger that CMA members will use reimbursement schedules created by the proposed managed care organization as a basis for an unlawful agreement to fix prices has not been eliminated. As the Joint Health Care Policy Statements caution "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices."⁵ Although distribution of such reimbursement schedules through the proposed managed care organization may serve the public interest, CMA and its members remain subject to the laws against price fixing. Setting aside the restrictions of the order should not be construed as approval for use by CMA or any of its members of a relative value guide as a basis for an unlawful agreement on

³ Because the order is reopened on public interest grounds, the Commission need not and does not consider whether CMA has met its burden of showing that the order should be reopened on the basis of changed circumstances.

⁴ The order as modified in 1985 already authorizes the distribution of RVSS to federal and state government bodies in connection with lobbying or participation in administrative or judicial proceedings and providing information and views to third party payers.

⁵ Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,784.

price. Likewise, CMA is subject to the antitrust laws in the operation of its managed care subsidiary.⁶

VI. CONCLUSION

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the order in Docket C-2967 be, and it hereby is, set aside, as of the effective date of this order.

Commissioner Starek concurring in the result only.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to set aside the order in this case. Respondent California Medical Association ("CMA") has discharged its burden of showing that the order's ban on the development and distribution of relative value studies is likely to impede CMA's formation and operation of a managed care subsidiary and that it is in the public interest to set the order aside. Consistent with the Commission's practice in numerous prior matters -- including Service Corporation International¹ and Tarra Hall Clothes² -- I reach this determination because it is merited under an overall weighing of the benefits and the costs of granting the relief requested by CMA.

As was the case in California and Hawaiian Sugar,³ however, I do not join in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the order" when a petition to reopen is judged under the public interest rubric.⁴ Neither the

⁶ Statement 8 and 9 of the Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,787-98, set forth the analysis of the applicability of the antitrust laws to physician network joint ventures.

¹ See Concurring Statement of Commissioner Roscoe B. Starek, III in Service Corporation International, Docket No. 9071 ("SCI") (May 12, 1994).

² Tarra Hall Clothes, Inc. and Abraham Cohen, Docket No. C-2797 (Oct. 27, 1992).

³ See Concurring Statement of Commissioner Roscoe B. Starek, III in California and Hawaiian Sugar Co., Docket No. C-2858 ("C&H") (Jan. 17, 1995).

⁴ Order Granting Petition To Reopen and Modify or Set Aside Consent Order, Docket No. C-2967, at 3 (Oct. 27, 1995) (*italics added*).

statute⁵ nor the Commission rule⁶ governing our consideration of such petitions says anything about "affirmative need." Instead, the concept has insinuated itself into the agency's stock explanation for modifying competition orders⁷ under a public interest standard because of an uncritical fidelity to language that made its first -- and unfortunate -- appearance in a letter issued more than a dozen years ago.⁸

Aside from being superfluous, the "affirmative need threshold" causes genuine mischief. At least on paper, it serves as an obstacle that a petitioner must overcome before the Commission will consider balancing the reasons for and against reopening and modifying (or setting aside) an order under a public interest standard. And, as I have previously noted, the Commission has compounded the confusion in this area by finding the affirmative need requirement satisfied on the basis of a very marginal showing by the petitioner -- that is, establishing a "threshold" and then, in case after case, finding that threshold crossed on the flimsiest evidence.⁹

In the present case, CMA may have made a showing sufficient to satisfy the majority's "affirmative need" standard; it is at least a closer call than in C&H.¹⁰ Under my reading of the governing statute and Commission rule, however, it is not necessary to make that judgment; rather, all that is required is the balancing of overall costs and benefits to which I alluded above. On the basis of that balancing, I agree with my colleagues that the order should be set aside.

⁵ Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

⁶ Rule 2.51(b) of the Commission's Rules of Practice, 16 CFR 2.51(b).

⁷ As I pointed out in C&H, that matter was the first order modification in the consumer protection area in which the affirmative need threshold appeared. Concurring Statement at 1.

⁸ In a letter sent to Joel E. Hoffman, Esquire in connection with Damon Corp., Docket No. C-2916 (Mar. 29, 1983), the Commission stated that a petitioner seeking an order modification in the public interest must demonstrate "[a]s a threshold matter . . . some affirmative need to modify the original order." [1979-83 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,007 at 22,585. The only support for this affirmative need threshold was a reference to a similar approach followed by the courts in modifying final court orders. *Id.* (citing *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982)). In *Gautreaux*, the court applied a two-step analysis in determining whether modification of a consent decree was appropriate, with the threshold step characterized as whether there were "exceptional circumstances, new, changed or unforeseen at the time the decree was entered," justifying modification of the decree. 535 F. Supp. at 426. The obvious Commission analogue to this exceptional circumstances inquiry would be requests to reopen based on changed conditions of law or fact, not requests to reopen under the public interest standard (under which modification may be justified even absent changed circumstances). The Commission has never explained -- and would be hard-pressed to do so -- why it has chosen to apply the affirmative need threshold when considering modifications based on the public interest.

⁹ See Concurring Statement in SCI at 2.

¹⁰ The evidence proffered by C&H fell far short of demonstrating that the order had caused it competitive harm. See Concurring Statement in C&H at 3.

IN THE MATTER OF

MUSTAD INTERNATIONAL GROUP NV, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3624. Complaint, Oct. 30, 1995--Decision, Oct. 30, 1995*

This consent order requires, among other things, a Switzerland corporation and its Connecticut subsidiary to either divest all of their Connecticut horseshoe nail manufacturing assets, or to divest four nail machines and to grant a license of technology and know-how to operate them, to a Commission-approved acquirer by May 15, 1996.

Appearances

For the Commission: *Howard Morese, Joseph G. Krauss and William Baer.*

For the respondents: *Peter L. Costas, Pepe & Hazard*, Hartford, CT.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Mustad Connecticut, Inc. ("Mustad Connecticut"), a Connecticut corporation, and Mustad International Group NV ("Mustad Group") have acquired all of the assets of Cooper Horseshoe Nail Co., Ltd., a majority interest in Emcoclavos S.A., and the horseshoe nail assets of Sterward Engineering Company, Ltd., and that such acquisitions violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS AND JURISDICTION

1. Respondent Mustad Connecticut, wholly-owned by Mustad International Group NV, is a corporation organized, existing and