

Complaint

121 F.T.C.

IN THE MATTER OF

RXCARE OF TENNESSEE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3664. Complaint, June 10, 1996--Decision, June 10, 1996*

This consent order prohibits, among other things, a Tennessee-based pharmacy service administrative organization and an unincorporated trade association from: entering into, maintaining or enforcing a "most favored nations" clause in any participation agreement with any pharmacy firm; auditing any pharmacy firm for the purpose of enforcing a "most favored nations" clause; or inducing, suggesting, urging, encouraging, or assisting any person or entity to take any action in violation of this order.

Appearances

For the Commission: *Randall D. Marks* and *Michael McNeely*.

For the respondents: *W. Ovid* and *Blakeley D. Matthews*,
Cornelius & Collins, Nashville, TN.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents RxCare of Tennessee, Inc., and the Tennessee Pharmacists Association have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent RxCare of Tennessee, Inc. (RxCare), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 1226 17th Avenue South, Nashville, Tennessee. RxCare is a pharmacy service administrative organization ("PSAO"), a group of pharmacies that offer themselves as a pharmacy network to pharmacy benefits managers ("PBMs") and third-party payers, such as managed care

organizations ("MCOs"), insurers, and employers who pay for prescription drugs provided as part of health benefit plans. A pharmacy network is the group of pharmacies that provides a given PBM or third-party payer with prescription drug services by filling the prescriptions of those served by the PBM or third-party payer. RxCare's pharmacy network includes at least 95 percent of all chain and independent pharmacies in Tennessee. In conjunction with Pro-Mark Holdings, Ltd. ("Pro-Mark"), a Rhode Island corporation, RxCare also offers pharmacy benefit management services, such as designing prescription drug benefit plans, providing drug utilization review services and data, and managing drug formularies.

PAR. 2. Respondent Tennessee Pharmacists Association ("TPA") is an unincorporated trade association organized, existing, and doing business under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 226 Capitol Blvd., Suite 810, Nashville, Tennessee. TPA is the largest professional association of pharmacists in the state of Tennessee and has approximately 2500 members. TPA created RxCare and is its sole shareholder. Among TPA's goals is to "define and promote appropriate compensation to pharmacists for patient care."

PAR. 3. RxCare and TPA are corporations subject to the jurisdiction of the Commission under Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. The acts and practices of RxCare and TPA, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Third-party payers pay for about half of all prescriptions in Tennessee. RxCare provides the pharmacy network in Tennessee for major health care providers, including at least 90 percent of the state of Tennessee's TennCare program for Medicaid recipients and other uninsured citizens and all of the TennCare and non-TennCare business of BlueCross BlueShield of Tennessee, the state's largest managed care organization.

PAR. 6. RxCare is the leading pharmacy network in Tennessee, providing PBM and/or network services to MCOs and PBMs accounting for approximately 2.4 million residents of Tennessee, who represent more than half of Tennessee citizens with third-party pharmacy benefits. Because the RxCare network is the largest source of third-party business for almost all Tennessee pharmacies, it is important for pharmacies to be part of the RxCare pharmacy network.

PAR. 7. RxCare's agreements with the pharmacies in its provider networks include a "Most Favored Nations" or "MFN" clause. This clause requires that if a pharmacy in the network accepts a reimbursement rate from anyone else that is lower than its RxCare rate, the pharmacy shall accept such lower reimbursement rate for all RxCare contracts in which it participates. RxCare requires that each pharmacy in its network agree to this clause as a condition of remaining within its network, and enforces this clause against pharmacies that have accepted lower reimbursement rates from other persons.

PAR. 8. By promulgating and enforcing the MFN clause, RxCare and TPA have been acting as a combination of competing pharmacies and have acted in concert with TPA members and RxCare network pharmacies to maintain reimbursement levels for pharmacy services. Their use of the MFN clause and other activities have restrained rivalry in the provision of pharmacy benefit prescription services among Tennessee pharmacies and thereby harmed consumers by limiting price competition and entry into pharmacy network services. These activities of RxCare and TPA constitute an agreement in restraint of trade.

PAR. 9. In furtherance of such combination or agreement, RxCare and TPA have:

A. Required providers to agree to the MFN clause as a condition of remaining in, or joining, the RxCare network;

B. Enforced, and threatened to enforce, the MFN clause against network pharmacies that accept a reimbursement rate below the RxCare reimbursement rate;

C. Communicated third-party payers' offers of reimbursement that fall below the RxCare reimbursement rate and warned that acceptance of such rates might trigger the MFN clause; and

D. Urged pharmacies to refrain from participating in networks that offer reimbursement rates lower than the RxCare network rates.

PAR. 10. Because RxCare represents such a large portion of their business, most pharmacies in Tennessee would incur an unacceptable revenue loss if the MFN clause forced them to accept rates below the RxCare reimbursement rate on all of their RxCare business. As a result, the MFN clause has prevented some RxCare network pharmacies from accepting rates below the RxCare reimbursement

rate from other third-party payers. Further, since third-party payers in states other than Tennessee frequently offer reimbursement rates below the RxCare reimbursement rate, the MFN clause has forced third-party payers to pay higher rates in Tennessee than in other states. Moreover, the difficulty in establishing pharmacy networks that accept reimbursement at levels as low as the levels in other states has impeded entry by firms wishing to establish pharmacy networks or market prescription drug benefit in Tennessee.

PAR. 11. The combination or agreement and the acts and practices of RxCare and TPA have restrained competition unreasonably and injured consumers by:

A. Stabilizing reimbursement levels for third-party prescription services above competitive levels;

B. Inhibiting the establishment or expansion of pharmacy networks that could compete with the RxCare network;

C. Depriving consumers of the benefits of price competition among pharmacists with regard to participation in prescription drug benefit plans;

D. Depriving consumers of the benefits of competition among third-party payers in the establishment of prescription drug benefit plans.

PAR. 12. The acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent RxCare is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 1226 17th Avenue South, Nashville, Tennessee.

2. Respondent TPA is an unincorporated trade association organized, existing, and doing business under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 226 Capitol Blvd., Suite 810, Nashville, Tennessee.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That the following definitions shall apply herein:

A. "*RxCare*" means RxCare of Tennessee, Inc.; its predecessors, divisions, subsidiaries, affiliates, joint ventures, successors, and assigns; and all directors, officers, employees, agents, and representatives of the foregoing;

B. "*TPA*" means the Tennessee Pharmacists Association; its predecessors, divisions, subsidiaries, affiliates, joint ventures, successors, and assigns; and all directors, officers, employees, agents, and representatives of the foregoing;

C. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in the plan or program as eligible for coverage ("covered persons") and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; and health benefits programs for government employees, retirees and dependents;

D. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer, prescription benefit manager ("PBM"), pharmacy service administrative organization ("PSAO"), or other firm agrees to reimburse a pharmacy firm for the dispensing of prescription drugs to covered persons, and the pharmacy firm agrees to accept such payment from the third-party payer, PBM, PSAO, or other firm for such prescriptions dispense during the term of the agreement;

E. "*Pharmacy firm*" means any partnership, sole proprietorship, corporation, or other entity that owns, controls or operates one or more pharmacies; and

F. "*Most Favored Nations Clause*" or "*MFN*" means any agreement, understanding, or course of dealing between RxCare or TPA and any pharmacy firm under which, in the event the pharmacy firm accepts or agrees to accept from another third party payer, PBM, PSAO or other firm a lower reimbursement rate than the lowest RxCare reimbursement rate, the pharmacy firm must thereafter accept a reduction in its reimbursement rate for any or all RxCare contracts in which it participates. The term "Most Favored Nations Clause" includes, but is not limited to, any price protection clause, buyer protection clause, prudent buyer clause, consumer protection clause, meet or release clause, best price clause, or meeting competition clause.

II.

It is further ordered, That RxCare and TPA shall forthwith cease and desist, directly or indirectly, from:

A. Entering into, maintaining, or enforcing a Most Favored Nations Clause in any participation agreement with any pharmacy firm or by any other means or methods;

B. Auditing any pharmacy firm for the purpose of enforcing a Most Favored Nations Clause; or

C. Inducing, suggesting, urging, encouraging, or assisting any person or entity to take any action that if taken by RxCare or TPA would violate this order.

III.

It is further ordered, That RxCare shall, within thirty (30) days after the date this order becomes final:

A. Remove all Most Favored Nations Clauses from its agreements with pharmacy firms;

B. Distribute a copy of this order, the attached Appendix, and the complaint to each pharmacy firm with which RxCare has a participation agreement; and

C. Publish the Appendix to this order in the RxCare Update and on the "RxCare Network News" page of the Tennessee Pharmacist, or any successor publication(s).

IV.

It is further ordered, That, for the purpose of determining or securing compliance with this order, RxCare and TPA each shall:

A. Within sixty (60) days after the date this order becomes final, submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this order;

B. One year (1) from the date this order becomes final, annually for the next four (4) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, file

a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order. Respondents shall include in their compliance reports all written communications, internal memoranda, and reports and recommendations concerning compliance with this order;

C. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

2. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents; and

D. For a period of ten (10) years after the date this order becomes final, notify the Commission at least thirty (30) days prior to any proposed change in TPA or RxCare such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

V.

It is further ordered, That this order shall terminate on June 10, 2016.

APPENDIX

[Date]

ANNOUNCEMENT

The Tennessee Pharmacists Association ("TPA") and RxCare of Tennessee, Inc. ("RxCare"), have entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued a consent order on June 10, 1996,

providing that RxCare and TPA may no longer enforce a Most Favored Nations ("MFN") clause in the RxCare network provider agreements. The MFN clause requires that if a participating pharmacy accepts a lower reimbursement rate than the lowest RxCare rate, the pharmacy shall accept its lower reimbursement rate for all RxCare contracts in which it participates. As a result of the consent order, RxCare will not require that pharmacies in its network that enter into any agreement at a lower reimbursement rate than the RxCare reimbursement rate shall accept such lower reimbursement rate for RxCare contracts.

For more specific information, TPA or RxCare pharmacy network members should refer to the FTC consent order itself. TPA and RxCare will provide a copy of the consent order to each pharmacy firm with which RxCare has a participation agreement.

Baeteena Black, Pharm. D.
Executive Director
Tennessee Pharmacists Association

Gary Cripps, Pharm. D.
Chairman & President
RxCare of Tennessee, Inc.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I join in the Commission's decision to issue a consent order prohibiting the Tennessee Pharmacists Association, a trade association of pharmacists, and its affiliated provider of pharmacy network services, RxCare of Tennessee, Inc., from employing most favored nation clauses in provider network contracts. I write separately to emphasize that this order does not call into question the general lawfulness of most favored nation clauses. Although most favored nation clauses usually raise no competitive concerns, in this case, the clause was used in furtherance of a horizontal agreement to stabilize the reimbursement rates for retail pharmacy services, as alleged in paragraph eight of the complaint.

STATEMENT OF COMMISSIONER CHRISTINE A. VARNEY

RxCare, a pharmacy network established and owned by the Tennessee Pharmacists Association, contracts with health plans to provide prescription drugs to the plans' subscribers. I have voted to issue the complaint and accept the consent order in this matter

because I agree that the most favored nations clause, in this case, may have lessened competition. But, in doing so, I want to emphasize that joint ventures by retail pharmacists can be procompetitive by injecting new competition into the market for pharmacy benefit management services.¹ I believe many of RxCare's programs can be procompetitive. The matter before the FTC concerns only one aspect of RxCare's pharmacy benefit management programs--its imposition of a most favored nations clause. By working on an expedited basis, staff has been able to identify this concern quickly and, by working closely with RxCare, has resolved it in a mutually agreeable fashion.

¹ See Prepared Remarks of Christine A. Varney, "Responses to the Managed Care Revolution: A Competition Policy Perspective," Conference of the National Ass'n of Retail Druggists, March 27, 1995.

Complaint

121 F.T.C.

IN THE MATTER OF

TIMOTHY R. BEAN

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3665. Complaint, June 10, 1996--Decision, June 10, 1996

This consent order prohibits, among other things, a California individual doing business as DMC Publishing Group from misrepresenting, in its advertisements for a work-at-home business, the profits, earnings, income, or sales from such business opportunity and prohibits any future earnings claims unless, at the time of making the representation, the respondent possesses and relies upon competent and reliable evidence that substantiates the claim.

Appearances

For the Commission: *Nicholas J. Franczyk, C. Steven Baker and Charulata Pager.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Timothy R. Bean, individually and doing business as DMC Publishing Group ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Timothy R. Bean is an individual doing business as DMC Publishing Group. His principal office or place of business is located at 26052 Merit Circle, Suite 107, Laguna Hills, California.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of a program to operate a publishing and printing business at home to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.