

FTC ISSUES OPINION EXPANDING “OWN USE” TO INCLUDE CONTRACTED WORKERS

by Ann T. Hollenbeck

On March 13, 2003, the Bureau of Competition (“BOC”) within the Federal Trade Commission (“FTC”) issued an advisory opinion to Valley Baptist Medical Center (“Medical Center”) concluding that the resale of pharmaceuticals purchased by the Medical Center at a discount to the Medical Center’s contracted workers was allowable because the pharmaceuticals were purchased for the Medical Center’s “own use” within the meaning of the Non-Profit Institutions Act (the “Act”).

History. In 1976, the U.S. Supreme Court issued its opinion in Abbott Laboratories v. Portland Retail Druggists Association, a case where retail pharmacies sued pharmaceutical manufacturers under the Robinson-Patman Act, challenging the discounted sale by pharmaceutical manufacturers to nonprofit hospitals of drugs that the hospitals resold to patients and other persons in several different circumstances. In its opinion, the Supreme Court found that the Act provides a limited exemption allowing the resale of discounted pharmaceuticals that are dispensed for the hospital’s “own use,” meaning for “use by the hospital in the sense that such use is a part of and promotes the hospital’s intended institutional operation in the care of persons who are its patients.” The Court held that pharmaceuticals dispensed to hospital patients for use on the premises or on a take-home basis for a limited amount of time and to employees, students and medical staff members for their personal use were allowable as “own use” dispensations under the Act. Pharmaceuticals dispensed to walk-in patients, non-hospital patients of medical staff members or to former patients to refill take-home prescriptions, however, were not found to be allowable because such were not deemed to fall within “own use.” The Supreme Court focused on the strength and proximity of the relationship between the dispensation of pharmaceuticals and the hospital’s core patient care functions in setting the parameters of “own use” pharmaceutical dispensations under the Act.

The Supreme Court’s rationale that the resale of pharmaceuticals to hospital employees falls within the hospital’s “own use” is based on the Court’s conclusions that employees are necessary for the hospital’s functioning and operations. This rationale has been applied in prior FTC opinion letters that have found pharmaceuticals dispensed to retired employees pursuant to an established retirement program and to volunteers who participate in the programs and activities of a non-profit nursing home “to a significant extent and on an on-going basis” fall within “own use.” This rationale is applied in this Advisory Opinion, as well.

Advisory Opinion. Medical Center is a nonprofit hospital with approximately 200 contracted workers who provide food and laundry services on the premises of the Medical Center. While the workers assigned to the Medical Center work there exclusively (and some over long periods of time), they are not employees of the Medical Center and are not covered by the Medical Center’s health benefits plan. A contracting firm hires, fires and supervises the workers, pays unemployment and workers compensation premiums and provides any benefits to which the workers are entitled.

In concluding that the dispensation of pharmaceuticals to these contracted workers falls within the Medical Center's "own use", the FTC cited the following factors: the exclusive work the contracted workers perform on behalf of the Medical Center, their work on the Medical Center's premises and the long-term service of many workers, the importance of the work performed in providing care to Medical Center's patients, the increase in the workers' productivity and decrease in turnover by making health care services and supplies more affordable and available. The fact that the Medical Center elected to contract for the workers rather than employ them does "not appear to have any significance for the policies underlying" the Robinson-Patman Act or the Act. Thus, the BOC concluded that pharmaceuticals purchased by the Medical Center for resale to contracted workers would be purchased for the hospital's "own use" within the meaning of the Act.

Applicability of Advisory Opinion. This Advisory Opinion is an important indicator of the FTC's opinions and views of "own use" and is valuable guidance; however, it must be noted that the Advisory Opinion sets forth the views of the staff of the BOC within the FTC. The FTC is technically not bound by the opinion and reserves the right to rescind it at a later time. Further, the BOC retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revise the opinion if implementation of the opinion results in substantial anti-competitive effects, if the facts change significantly or if it would otherwise be in the public interest to do so.

The full text of the Advisory Opinion can be found at: www.ftc.gov/bc/advisory.htm.

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