



Alerts

FTC Allows Hospital to Sell Discounted Drugs to EMS Provider During Shortage

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Health Law Alert

In a November 30, 2012 advisory opinion, the Federal Trade Commission (FTC) stated that a nonprofit hospital system, The Methodist Hospital System (Methodist), may resell pharmaceuticals it purchased at Non-Profit Institutions Act (NPIA)-discounted prices to the local emergency service provider (EMS) during a critical period of nationwide drug shortages. The FTC reasoned that Methodist's proposal constitutes a permissible humanitarian gesture in a time of emergency and, therefore, an analysis of whether the proposal raises antitrust concerns or a possible violation of the Robinson-Patman Act (RPA) need not be undertaken.

The RPA generally prohibits sellers from discriminating in price on the sale of goods or products to equally situated distributors, or resellers, of the same goods or products in the same geographic area when the effect of such sales is to reduce competition. Under the NPIA, however, when a nonprofit entity purchases a product at discounted price from what might be offered to a for-profit competitor, the nonprofit entity is exempt from liability under RPA if the product is for its own use.

Methodist is a nonprofit hospital system and obtains its pharmaceuticals at a NPIA-discounted rate. It became concerned that by selling those same discounted drugs at its cost to its local EMS, the NPIA would not apply and such sale might be considered a violation of the RPA. Methodist and the local EMS are both in the business of providing health care to patients in the same geographic area, and, therefore, could possibly be deemed competitors. Methodist is a nonprofit entity, while the local EMS is a division of the city of Baytown, Texas, and is technically a for-profit entity. Methodist's proposal would create a sale of a product at a discounted price from what normally might be offered by the pharmaceutical seller to an equal for-profit competitor in the same area which, without more, might hint at possible liability under the RPA. There also was concern about whether NPIA would apply here because the local EMS is a for-profit entity, although it does not turn a profit, and Methodist would not be using the NPIA-discounted drugs for its own use. Based on these dual concerns, Methodist sought an FTC advisory opinion to determine whether its proposal would violate the RPA and if the NPIA would apply.

Interestingly, the FTC did not analyze the proposal under either statute. The agency expressly stated that its opinion "shall not be construed as taking the position that the Robinson-Patman Act necessarily applies to these facts, or that Methodist's proposed sale to [the local] EMS would violate the Robinson-Patman Act absent the shortage situation or other applicable exemption." Instead, the FTC deemed Methodist's proposal permissible as an emergency humanitarian gesture due to its sole purpose of assisting the local EMS in the care of patients during the current nationwide drug shortages. The FTC's opinion appears to have focused on the specifics of each party, the nature of the relationship between Methodist and the local EMS, the availability of other providers within the same area, the severity of the drug shortage for the relevant area, and the terms of the sale.

Methodist operates the only full-service general acute care center in Baytown. The local EMS is the exclusive transport provider for the city and a large majority of its transports are taken to Methodist's hospital. The local EMS has been unable to obtain critical pharmaceuticals necessary for administration prior to the arrival at Methodist. To rectify this issue, Methodist proposed selling to the local EMS those critical pharmaceuticals at its cost and to continue the arrangement only as long as the shortage continues.



The FTC applied these factors and compared Methodist's proposal to the situations in *Abbott Labs. v. Portland Retail Druggist Ass'n, Inc.*, 425 U.S. 1 (1976) and *St. Peter's Hospital of the City of Albany*, 92 F.T.C. 1037 (1978), both of which established that in an emergency a hospital may act in a way which may otherwise be deemed in violation of the RPA or the NPIA, so long as its conduct was a humanitarian gesture. The FTC opined that Methodist's proposal to sell its NPIA discounted drugs to the local EMS at Methodist's cost during the emergency caused by the nationwide drug shortages was a humanitarian gesture and not subject to review under the RPA.

The larger question is whether the advisory opinion has broader applicability. The answer is that it may, subject to two conditions. First, it applies only if acts are taken solely as a "humanitarian gesture," and there is no definitive definition of that term. Second, as with all FTC advisory opinions, this one is only as instructive as to its specific facts. The FTC is not bound by this opinion and may reconsider or rescind its position at any time. Accordingly, each "emergency" and "humanitarian gesture" must be reviewed under its own terms and own set of facts to determine the threat of possible liability under the RPA and applicability of the NPIA.

[The Methodist Hospital System Advisory Opinion, November 30, 2012](#)

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