

G. STATEMENT OF ISSUES TO BE RAISED ON APPEAL

1. Did the district court err in not even considering whether medical physician members of Trigon's Managed Care Advisory Panel, who were not employees of Trigon, acted as representatives of the medical societies that represented all direct medical physician competitors of the plaintiff chiropractors, and which societies "appointed" their medical physician representatives to the panel to "consult with," "approve" and "endorse" the anticompetitive actions of Trigon directed at chiropractors?

2. Did the district court err in applying the intracorporate immunity doctrine to insulate Trigon from any antitrust liability for conspiracy with medical societies of competitive medical physicians that were represented by their designees on the Managed Care Advisory Panel who had the power to "consult with," "approve" and "endorse" the anticompetitive activities of Trigon?

3. Even if, *arguendo*, contrary to the evidence, the non-Trigon employee members of the Managed Care Advisory Panel were not acting solely as representatives of their respective competitive medical societies, did the district court err by applying the intracorporate immunity doctrine to shield Trigon from antitrust liability for acting in concert with those individuals to effectuate anticompetitive actions harmful to the plaintiffs?

4. Did the district court err in deciding that intracorporate immunity extended to non-Trigon employee members of the Managed Care Advisory Panel by failing to review the

facts and circumstances of the relationship between the Panel members and Trigon, as an economic entity rather than a healthcare entity, as required under the 4th Circuit's *Oksanen* decision?

5. In assuming, contrary to the evidence, that the Panel members were solely agents of Trigon, did the district court ignore or otherwise pass judgment on the evidence that creates a genuine issue of material fact as to whether the Panel members were legally distinct from their appointing trade (professional) association bodies and from Trigon?

6. Did the district court err in applying the intracorporate immunity doctrine in this case because the intracorporate immunity doctrine has been applied narrowly in the Fourth Circuit only to (a) wholly-owned corporate subsidiaries and (b) medical staff/hospital relationships?

7. Did the district court err in finding that no genuine issues of material fact exist concerning whether the independent personal stake exception to the intracorporate immunity doctrine applies to the non-Trigon employee Panel members?

8. Does the evidence at least show a genuine issue of material fact as to whether Trigon and the members of the Managed Care Advisory Panel agreed to commit anticompetitive acts?

9. Did the district court improperly adjudicate facts on summary judgment when it found that back care guidelines, which were approved by the Managed Care Advisory Panel and distributed by Trigon, “follow” the federal AHCPH guidelines?

10. Did the district court improperly adjudicate facts on summary judgment when it found, contrary to expert testimony, that the differences between the Trigon guidelines and the AHCPH guidelines were not harmful to chiropractors?

11. Did the district court abuse its discretion by denying plaintiffs the right to take discovery on activities that occurred between 1988 and 1996, especially since: (a) the plaintiffs allege that the conspiracy in the present case is merely a continuation of the “lengthy, systematic, successful, and unlawful” boycott by the American Medical Association of doctors of chiropractic which was finally enjoined in 1987; (b) as found by the United States District Court for the Northern District of Illinois, the “AMA’s purpose was to prevent medical physicians from referring patients to chiropractors and accepting referrals of patients from chiropractors”; and (c) the activities of Trigon and its medical society co-conspirators on the Managed Care Advisory Panel, that prevented referrals to chiropractors, apparently took place in the entire period from 1972 through 1996?

12. Did the district court abuse its discretion by denying plaintiffs the right to take further discovery concerning the Managed Care Advisory Panel and all of the Panel’s participants, especially since Trigon only disclosed the existence of the Panel (and records of its meetings) to the plaintiffs approximately three weeks before the close of

discovery (after the plaintiffs independently learned of the Panel's relevant activity, but not its representative composition of competitors' societies, and brought it to Trigon's attention)?

13. Especially in view of Trigon's late disclosure of any information concerning the Managed Care Advisory Panel, did the district court abuse its discretion by failing to grant plaintiffs' motion to (a) extend discovery for six months, (b) compel Trigon to answer all discovery requests, interrogatories, and document requests for the time period January 1, 1988 to date, (c) compel Trigon to state clearly why no chiropractor or chiropractic organization was consulted and why their comments were not sought by Trigon when the Managed Care Advisory Panel published its distorted version of the AHCPR back care guidelines, and (d) compel Trigon to identify all medical physicians who reviewed, approved, modified, or endorsed the Managed Care Advisory Panel's guidelines on low back pain?

14. Especially in view of Trigon's late disclosure of any information concerning the Managed Care Advisory Panel, did the district court abuse its discretion by failing to grant plaintiffs' motions to compel Trigon to (a) disclose the number of medical doctors who hold any position, office, job, duty, or consultation position with Trigon, (b) identify every CPT code for which Trigon pays other providers less than they pay medical doctors (they pay chiropractors 40% less than medical physicians for the identical service), (c) produce all documents relating to Trigon's \$500 cap on the coverage of spinal manipulation, (d) produce all files of Trigon's former medical doctor employee

who participated in the Managed Care Advisory Panel (Dr. Colley), and (e) provide a knowledgeable, prepared witness to testify pursuant to a 30(b)(6) deposition on those topics?

15. Did the district court err by failing to allow plaintiffs to take a 30(b)(6) deposition(s) of Trigon on topics going directly to the heart of the conspiratorial actions charged in this case (especially including but not limited to the activities of the late-disclosed Managed Care Advisory Panel, the amounts paid by Trigon to each healthcare profession for treating back pain, and Trigon's practices since 1988 of paying chiropractors less than medical doctors for providing the same treatments) when the Scheduling Order specifically allowed for a reasonable number of Rule 30(b)(6) depositions of Trigon and the district court denied plaintiffs the deposition(s) because they would be unreasonably burdensome for Trigon without considering the plaintiffs' need for that discovery?

16. Did the district court abuse its discretion by limiting the information discoverable from the Medical Society of Virginia only to information from 1996 to the present concerning chiropractic services when the MSV's president in 1972 was later (1974) appointed to the AMA's Committee found to have illegally acted to destroy the profession of chiropractic, *Wilk et al. v. AMA et al.*, 895 F.2d 352 (7th Cir. 1990), and when the only appointees to the Committee were from state associations most active in attempting to destroy the profession of chiropractic?

17. Did the district court abuse its discretion by unreasonably limiting the number of interrogatories available to plaintiffs?

18. Did the district court err by failing to allow plaintiffs to file a surreply in support of plaintiffs' opposition to Trigon's motion for summary judgment?

19. In dismissing plaintiffs' RICO cause of action, did the district court err in holding that Va. Code Ann. § 38.200 is a law enacted for the purpose of regulating the business of insurance as contemplated by 15 U.S.C. § 1012(b) to the extent that it prohibits discrimination against chiropractors?

20. Did the district court err by ruling that there was no private cause of action to enforce Virginia's statutory insurance equality laws?

21. Did the district court err in finding that no genuine issue of material fact exists concerning whether Trigon's payments were unconscionable and whether the chiropractors were under duress when they signed their provider agreements with Trigon, and did the district court err by improperly adjudicating the facts when it found that "Trigon's limitations on treatment by chiropractors are not unusual in the healthcare field" given the distortion of all such programs as a direct result of the residue from the "lengthy, systematic, successful and unlawful" boycott of insurance programs for and referrals to chiropractors, *Wilk et al. v. AMA et al.*, 895 F.2d 352 (7th Cir. 1990)?

22. Did the district court err in finding that, contrary to the evidence, “the facts as recited in connection with the federal antitrust laws equally show that no violation of the Virginia conspiracy laws has occurred”?

23. Did the district court err in finding that, contrary to the evidence, there was no evidence of any improper means of tortious interference because there was no violation of the antitrust laws?

24. Did the district court err in holding that there was no evidence of an agreement between Trigon and members of the Managed Care Advisory Panel to act to prevent referral of patients to chiropractors?

25. Did the district court err by failing to give plaintiffs on summary judgment the benefit of the inference that a decrease in the average number of visits to chiropractors by persons insured by Trigon, and the parallel decrease in the coverage payment per patient, was a result of Trigon’s policies discouraging persons from seeking treatment by chiropractors?

26. Did the district court abuse its discretion by inconsistently counting the number of discrete interrogatory subparts so as to deny plaintiffs discovery but allow Trigon discovery?

27. Did the district court abuse its discretion by failing to allow plaintiffs a reasonable opportunity to discover the extent of the relationships between Trigon and the medical doctors/medical societies in Virginia?

28. Did the district court abuse its discretion by failing to allow a reasonable scope of examination of Dr. Colley after critical documents from his files were produced with approximately only three weeks remaining in the discovery period?

29. Did the district court err by ignoring the record evidence that Trigon and the other members of the Managed Care Advisory Panel agreed to rewrite the AHCPR guidelines to prevent referrals to chiropractors, specifically including but not limited to the following evidence:

The [secret, confidential] meeting of the Managed Care Advisory Panel was held on October 25, 1995

...

Approval of Practice Guidelines from Regional Committees

...

Dr. Hattwick [of the Virginia Society of Internal Medicine]: we need to go over these one by one -- are these meant to be referral guidelines?

Dr. Colley: yes, they are referral guidelines.

Dr. Hattwick: we should emphasize that they are referral guidelines, if they are.

...

[Trigon's Revised Guidelines] Unanimously adopted by Committee.

when Trigon and the Advisory Panel subsequently downplayed the specific type of manipulation and made no reference to referrals of any sort other than to surgeons?

30. Did the district court err in finding that Trigon had no economic motive to prevent referrals to chiropractors when in fact the evidence is clear that Trigon needed money to

enhance medical physicians' payments and took it from reduced payments to chiropractors, as shown by at least the following record evidence posted on the website of the Medical Society of Virginia which makes clear that Trigon negotiates its reimbursement fees with medical doctors:

Trigon Contract Reminder

Physicians around the state are now receiving new contracts from Trigon (TSI). As always, the MSV recommends that physicians and their office staff carefully review all contracts before signing, including their fee schedule. While the MSV recently reviewed this contract and made recommendations that were accepted by Trigon, individual practices should still review these contracts for issues that may be pertinent or unique to their specific situation.

as well as from the following record evidence demonstrating that, although Trigon declined to follow the government-based RBRVS reimbursement system for chiropractic services, it announced its adoption of the RBRVS system as favorable for the other Trigon "physicians":

With the completion of the RBRVS implementation, most Trigon allowances will be proportional to Federal Relative Values. For a small minority of services [i.e. chiropractic], market conditions will have dictated exceptions to RBRVS.

...

Trigon is optimistic that 1997 fee schedule changes can be much more favorable for network physicians. The performance-based reimbursement program described in the July issue of the *Medical Forum* creates new opportunities for physicians to increase their compensation while decreasing total health care costs for the next several years.

31. Did the district court err in finding that Trigon had no economic motive to prevent referrals to chiropractors in view of the evidence that Trigon's favored group of physicians (medical doctors) was receiving 70% of every dollar for musculoskeletal care

and the chiropractors were receiving 30%, and that the slippage of that kind of money and the withdrawal of a major part of that 70% would have depleted the insurance dollars available for the favored group?

32. Did the district court err by improperly adjudicating issues of material fact against plaintiffs by finding that the Managed Care Advisory Panel had no decision-making authority over the anticompetitive conduct?