Jack Stout

INTERFACE

Joint Ventures and Antitrust

Bringing together competitors for joint ventures can be dangerous

by George E. Leonard

The third of a three-part series is written by George E. Leonard, who has specialized in antitrust work since the late '60s, the past 10 years with antitrust issues in the health care industry. Though he resists the claim, Leonard knows more about the economic impact of various prehospital system designs than do many of our industry's experts.
– Jack Stout

In last month's article for this column, I discussed the "state action" exemption from the antitrust laws, which was the decisive legal issue in the *Gold Cross v. Kansas City* case. In *Gold Cross*, the court ruled that a Missouri statute which allowed a city ". . . to contract with one or more . . . operators" to furnish ambulance service was a sufficient statement of a state policy to regulate competition in the emergency prehospital care industry to exempt Kansas City from the antitrust laws.

At the time of the Gold Cross ruling, I believed that was about as far as a court would go in applying the "state action" exemption to a city which opts for a competitively bid, sole-provider system. I was wrong.

Since writing that article last month, I was hired by the city of Fort Worth (Texas) to defend a request for preliminary injunction under the federal antitrust laws. Fort Worth had adopted an ordinance last fall as part of its bid process, which granted exclusivity over all transfers (emergency and non-emergency) within Fort Worth to the successful bidder. The bid process resulted in the awarding of a contract to a joint venture, Hartson Ambulance of San Diego, and Mercy Ambulance of Las Vegas, Hartson and Mercy. That contract is to become effective on April 1, 1986. Plaintiffs, as in *Gold Cross*, were small non-emergency operations, which were threatened with loss of non-emergency business by the ordinance, and by the grant of market exclusivity to the successful bidder.

"Joint ventures are illegal if they serve to fix fees or to divide and allocate markets or customers."

The court held a full-scale hearing in which experts from the industry, including Art Wiggins, Executive Vice-President of Metro Ambulance, Marietta (Ga.); John Perkins, Director of Gold Cross Ambulance, Rochester (Minn.); Mark Wozmak, Executive Director of MAST, Kansas City (Mo.); Tom Morgan, Hartson Ambulance of San Diego (Calif.) and Jack Stout (the regular author of this column), testified on behalf of Fort Worth. After hearing the evidence, the court denied an injunction to plaintiffs, ruling that Fort Worth was exempt from the antitrust laws.

The court relied on two sections of Texas law, one of which provides:

"The purpose of this Act is to provide for the prompt and efficient transportation of sick and injured patients, after necessary stabilization, and to encourage public access to such transportation in all areas of the state."

The other portion of the statute, upon which the court relied, states:

"A city or town may establish standards for the staffing or stocking of equipment of EMS vehicles. If standards are established under this Section, they *must be stricter* than the minimum standards of this Act and department rules adopted under this Act." (Emphasis added)

I believe that the reason the Texas federal judge was willing to so broadly interpret these two statutes to find that they set forth a "state policy to replace competition with regulation" was due in great measure to the expert testimony of the gentlemen listed above. They described problems in two-tiered systems of EMS delivery systems. I would like to publicly acknowledge and thank Messrs. Wiggins, Perkins, Wozmak, Morgan and Stout, for traveling to Fort Worth on short notice to testify (as well as their respective employers, for letting them do so) as to their knowledge and opinions on EMS. It was very helpful, and very much appreciated, both by me and the city of Fort Worth, Texas.

Based upon the two decisions in *Metro Ambulance v. Fort Worth*, and *Gold Cross Ambulance v. Kansas City*, I believe that one can conclude that if there is almost *any* state regulation of EMS, and *any* delegation to cities of authority to set standards, the "state action" exemption may well apply, and a city's action in going to a sole-provider system will be upheld as exempt from antitrust scrutiny.

Even so, such exemptions should not be considered automatically applicable to any action by a city. Courts may also require the city to show that its specific conduct is a reasonable and logical means of implementing the legislature's expressed intent.

The one caveat which I would add is that the court facing such an issue needs to be 1) educated in the industry, and 2) convinced that allowing a city to move the focus of competition from the streets

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(retail) to the bid table (wholesale) is in the public's interest. It is in that education and convincing process that dedicated and experienced professionals (and their opinions) such as the gentlemen listed above are important.

The bid process in Fort Worth brings up another interesting issue under the antitrust laws, the issue of joint ventures. In the Fort Worth process, Hartson of San Diego and Mercy of Las Vegas, formed a new corporate entity, in a joint-venture, to bid the Fort Worth contract.

There can be any number of reasons for competitors to form a joint venture. They can include such goals as expansion into new markets; matching one company's strengths and weaknesses with another's strengths and weaknesses; spreading fixed costs; making use of another company's capital or expertise and others. In discussing joint ventures, I will limit my comments to those between two ambulance companies, i.e. competitors or would-be competitors.

Because they bring together two competitors, joint ventures can be dangerous from an antitrust point of view. If they are simply a device to fix fees, or to divide and allocate markets or customers, joint ventures would be *per se* illegal. (Refer to the February article in *jems* for a discussion of the seriousness of that finding.) Therefore, companies seeking to utilize a joint venture need to be very careful that the business arrangement be for the proper purposes – that is, to pool the resources of two companies, in order to create a new, stronger competitor in the marketplace. So long as that is done, the result is "procompetitive" (another competitor is created where one did not exist before), and it will withstand antitrust challenge.

Turning now to some current potential problems in the industry, I wonder if any of the readers have ever had the following experience:

1. You operate Able Ambulance. Your competitors are Best Ambulance, Capable Ambulance and Dependable Ambulance. The city's health director calls the four managers of Able, Best, Capable and Dependable into his office and says, "Guys, the policiticians are screaming at me, because your prices are all over the lot. Some of you charge $100 for a non-emergency, while others are as high as $150, and your emergency bills are even worse. Some of them are as low as $160 while others are as high as $300. If you want to be licensed next year, you guys better get your prices closer together to get the heat off of me." As a result, Able, Best, Capable and Dependable all agree to charge the same rates for non-emergency and emergency runs.

2. The health director calls you and your competitors in and says, "The newspapers are crucifying me, because your response times are too slow. When each of you tries to serve the whole city, emergency and non-emergency, it takes too long sometimes. Why don't you all agree that Able will take the northeast area, Best will take all of the northwest area; Capable will take the southeast quarter, and Dependable will take the southwest quarter. Each of you will be responsible for those sectors." As a result, the town is split into quarters, and each of the four companies serves only its allocated area.

3. Or, alternatively, a "round-robin" sys-

tem of dispatching is used, in which each company takes a turn responding to a call, in order.

Do any of those sound familiar? In my opinion, all of the above scenarios are agreements among competitors, and are *per se* illegal under Section 1 of the Sherman Act. If a suit were brought against Able, Best, Capable and Dependable, they would not be able to defend themselves by pointing at the city, nor would they be able to make the city help them pay any triple damage judgment. Cities are *immune* from triple damage suits. The *only* exception to the conclusion that these arrangements are *per se* illegal violations (and therefore felonies) is *if*: 1) the state in which you are located has expressed a "clearly articulated policy" to displace competition in ambulance services, *and* 2) the state actively supervises (by rate review or the like) the conduct in question.

If those two elements are not *both* present, the private operators Able, Best, Capable and Dependable are engaged in illegal price-fixing (agreeing on rates), or illegal market allocations (division of city geographically), or illegal customer allocations (dividing customers on a "round-robin" basis).

I doubt that the Antitrust Division of the Justice Department would indict anyone criminally except in the most flagrant price-fixing arrangement. That doesn't mean there are no problems with the conduct described above. Many state attorney generals love to get the publicity of suing "price fixers," particularly just before election time. Equally dangerous is the young attorney, just out of law school, with a three-hour course in basic antitrust laws his senior year. For example, Young Lawyer (*YL*) calls your company and gets your Office Manager (*OM*) on the phone:

YL: I want to complain about the bill from Able Ambulance, for my grandmother's trip from the nursing home to the hospital last week. I think $135 is too much to charge for hauling someone two miles.

OM: Oh, well, that's the price everyone charges for non-emergency work. We've all charged that for the last several years.

YL: What do you mean, "We've all charged that?"

OM: Well, Able, Best, Capable and Dependable all charge the same thing, $135 for non-emergency, because the city asked us to all keep our rates the same.

Bingo! Triple damage lawsuit, here we come. And in the suit, *YL* alleges that he should represent "all non-emergency transport patients who have been transported in the last few years" and the

court lets him do so (i.e. a "class action" lawsuit), and then *YL* at trial proves that in your neighboring town (a town fairly similar to yours), rates are only $115 for non-emergency runs. You, and your competitors, have a big problem on your hands at that point. You are faced with a damage claim that could break your company. And, equally importantly, it is a fairly easy case for a plaintiff. In fact, it's almost simple.

What can you do to protect yourself, if you are in these kinds of markets? The answers are neither sure nor simple. My advice would be, for the moment, to get out of any agreement, formal or informal with your competitors or with the city. Go your own way, until such time as you can re-structure the market into a more logical system.

You need to make a choice! Do you prefer some form of governmental interference in the process? If your choice is for a total free market, then your answer is fairly simple. Don't agree with your competitors on anything! That includes, primarily, rates, but also call-rotations and geographical divisions of territory.

However, if you decide that some governmental regulation is desirable, or acceptable, it becomes necessary to decide what type, and how much. Remember, that in order to insulate yourself from the antitrust laws, as a private operator, your state must 1) clearly have a policy to replace competition with regulation, and 2) the state must closely supervise the conduct. Further, remember that even joint lobbying is legal. The first thing you should do, then, is get your like-minded industry members down to the state capitol and start knocking on doors of legislators. Moreover, get your city officials and state health department officials on your side, and pushing for you. The type of legislation which private operators need must include close "state supervision" of the anti-competitive conduct, so be certain that such regulation is included in your proposed bill.

Cities' requirements are not as high. Courts do not require the "close supervision by a city," that they require for a private defendant. Rather, they require only a state policy to displace competition with regulation." So as an alternative, if you get the state to legislate regulation, and to delegate to the city the right to further restrain competition (i.e. by dividing the city up geographically, or by rotating calls) that action should qualify for exemption. I am not suggesting that I think this results in good patient care, only that such a market division by the city itself would probably pass antitrust muster.

Finally, if you are really confident of your ability, and you do not mind being a maverick, push for the city to grant an exclusive contract, by a competitive bidding process. If your state has some regulation, the city's act will be exempt under *Gold Cross v. Kansas City* and *Metro v. Fort Worth*. If not, the economical and medical reasons for granting market exclusivity to a successful bidder, and the pro-competitive result of a bid process should pass muster under the Rule of Reason analysis (described in the February "Interface").

I believe that the conduct of a city in granting market exclusivity to one bidder, in a fairly run bid process, is pro-competitive, and would be so held by a court facing these issues.

Absent these alternatives, though, do not make agreements with your competitors. □