2020

Vol 5 No. 20

Workers’ Compensation Insights

Prop 23 Advisors

Analysis + Answers = Advocacy

Mark Webb, Owner
Prop 23 Advisors
790 East Colorado Blvd., 9th Floor
PMB #691
Pasadena, CA 91101
626.422.6037

ALL DATA ALL THE TIME

The Central Pacific Data Company

On October 6, the House Judiciary Committee majority staff released its *Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations*, a prodigious 400+ page document laying out the vision of the Democratic majority on the Committee of how to address the many issues of competitiveness in the digital marketplace. The "Dominant Online Platforms" warranting specific attention in the report are, not surprisingly, Facebook, Google, Amazon, and Apple ("Big 4"). The document, and the documents from the Republican minority on the Committee, are the product of an extensive investigation conducted under the auspices of the Subcommittee on Antitrust, Commercial and Administrative Law, chaired by Representative David Cicilline (D-RI). The House Judiciary Committee is chaired by Representative Jerrold Nadler, (D-NY).

As noted in the Chairs' Forward to the Report:

"Although these four corporations differ in important ways, studying their business practices has revealed common problems. First, each platform now serves as a gatekeeper over a key channel of distribution. By controlling access to markets, these giants can pick winners and losers throughout our economy. They not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them. Second, each platform uses its gatekeeper position to maintain its market power. By controlling the infrastructure of the digital age, they have surveilled other businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats. And, finally, these firms have abused their role as intermediaries to further entrench and expand their dominance. Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant." (p.6, emphasis added)

The Republican staff report, adopted by Ranking member Jim Jordan (R-OH) and four additional Republican Committee members, is a far less weighty 29 pages, appears to focus on content moderation and adds Twitter to the list of Tech giants who warrant greater scrutiny. Their report is entitled *Reining in Big Tech's Censorship of Conservatives*.

Also on October 6, three Republican Representatives signed on to a separate report authored by Congressman Ken Buck (R-CO). The other Congressmen are Representatives Doug Collins (R-GA), Matt Gaetz (R-FL) and Andy Biggs (R-AZ). It should be noted that Representatives Buck, Collins, and Gaetz also endorsed the staff report. Per Representative Buck's announcement, their report: *The Third Way: Antitrust Enforcement in Big Tech*, "…serves as a response to the majority staff's report on the year-long Big Tech investigation conducted by the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law."

As stated in *The Third Way* document:

> "We write this response to join Chairman Cicilline and the majority staff on certain recommendations, offer modifications to some recommendations, and argue against the wisdom of proceeding on a few recommendations. We also want to point out that the committee's ongoing efforts should emphasize issues that have been ignored but must be addressed in the future for a truly bipartisan approach to reforming Big Tech's dominant position in the marketplace. Finally, we want to thank the Chairman for not

> using this report as an opportunity to push a progressive labor, environmental, or other unrelated policy agenda under the guise of antitrust enforcement. We sincerely appreciate the Chairman's friendship and dedication to making this process open and accessible to all members." (p.2)

If nothing else, the brief glimmer of conviviality amongst majority and minority members makes these documents noteworthy.

As might be expected, the Big 4 were less sanguine about the majority report. On Amazon's blog, for example, the response was entitled, *Fringe notions on antitrust would destroy small businesses and hurt consumers*. Their top line summary of the report was,

> "Misguided interventions in the free market would kill off independent retailers and punish consumers by forcing small businesses out of popular online stores, raising prices, and reducing consumer choice and convenience."

It would appear there is bi-partisan loathing of the Big 4, but certainly not enough to deliver a bi-partisan bill until likely well after the November elections. If such a consensus were to emerge, it will probably generate considerable unintended consequences. Which leads to a discussion of another – and one could argue equally – important aspect of the digital marketplace: privacy.

Privacy and competition are intimately connected. Antitrust laws are also about competition. That should be a cautionary note for those who are concerned about the digital marketplace. For inexplicable reasons, it is not. The Big 4 are not to be seen in the campaign to oppose Proposition 24 – the California initiative creating yet another Byzantine regulatory architecture for privacy with minimal transparency and accountability – which in and of itself should speak volumes. If nothing else it should cause policymakers to take a closer look at how the General Data Protection regulation (GDPR) has affected competition in the European Union.

As noted in Gal, Michael S. and Oshrit Aviv in their article, *The Competitive Effects of the GDPR,* Forthcoming*, Journal of Competition Law and Economics* (2020):

> "…the price of data protection through the GDPR is much higher than previously recognized. As elaborated, the GDPR has two main harmful effects: it limits competition in data markets, creating more concentrated market structures and entrenching the market power of those who are already strong; and it limits data synergies, thereby preventing the creation of some data-based knowledge." (p.33)

The issue confronting policymakers is not the effect of the Big 4 on retail commerce *per se*. It is, potentially, their monopoly of the currency of our times – data.

As stated in the majority report, "To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."

Today's Big 4 likely share much in common with the Big 4 of California's earlier history: Collis Porter Huntington, Mark Hopkins, Jr., Leland Stanford, and Charles Crocker. The Big 4 of today, and their dominant online platforms, bear more than a slight resemblance to the Central Pacific Railroad of the 1860s. That includes the many and various ways policymakers in Washington, D.C. have played a material role in the growth and profits of these commerce-dominant companies.

Privacy laws and changes to our anti-trust legal environment, prompted by conduct of the "Dominant Online Platforms," should not be allowed to operate on separate tracks. Neither will reach their destination – which as yet is unknown – and the likelihood of a train wreck will be significantly higher.

Fee Schedule Disputes Point to Ailing Technology

The seemingly endless effort to revise fee schedules for Qualified Medical Evaluators (QMEs) and most recently for copy services, point to any number of problems, not the least of which being that there are far too many spoons in the workers' compensation menudo. For calendar year 2019, per the Workers' Compensation Insurance Rating Bureau (WCIRB), roughly $290 million was spent on medical-legal evaluations, a slight increase from 2018.

The efforts to craft a new medical-legal fee schedule (MLFS) have been well documented. In a different time and place, the amount of effort – and words – expended would have been worthy of a serialized Russian novel. While many think the end of this long journey is near, it is at least plausible that there will be even more legislation or litigation, or both, before a final schedule is actually adopted. One of the components of the proposed schedule is a per-page fee to the evaluator when the records submitted for review exceed a certain set amount. That, in turn, has set off alarms throughout the claims administration community.

It is more difficult to arrive at a number for costs to the system of copy services. Part of the reason for that is because of the way copy service costs are allocated among losses and loss adjustment expenses (LAE) for purposes of insurer statistical reporting – assuming I am reading the *Uniform Statistical Reporting Plan* correctly. There must be some level of largess in this slice of the workers' compensation pie given the over 50 pages of comments received from various service providers, claims administrators and other organizations. The proposed revisions to the copy service fee schedule weighed in at a very modest seven pages. As is the case with the medical-legal fee schedule, providers of copy services are essentially saying it's about time, while payers are crying foul over perceived abuses of the subpoena process and copying of unnecessarily duplicative records.

That really is not the point, however.

The problem is paper, whether literally or virtually. The workers' compensation system is drowning in a sea of medical reports, depositions, and various other records. It is a back-end consequence of a system that is too litigious and that provides little, if any, disincentives for vendors and others to make employers pay whenever there is a dispute over the nature and extent of permanent disability. To be clear, the documentation necessary to navigate a disabling workers' compensation claim in California is prodigious regardless of the efficiency that could be created in its collection, dissemination, and protection. That reality, however, should not be a bar to having a conversation as to how this could be done better.

This conversation *could* have been discussed within the context of the deliberations of the Blockchain Working Group (Working Group). Its final report, issued in July, was authorized by Assembly Bill 2658 (Calderon) in 2018. Among its provisions, the Working Group creates an analytical framework for assessing whether blockchain could be of use within certain government functions. The pilots recommended by the Working Group did not include anything involving the Department of Industrial Relations or any of its Divisions.

Regardless, the framework in the Working Group's report should be closely reviewed for its potential application to the administration of the med-legal process and, potentially, other records-intensive functions of the workers' compensation system, such as Independent Medical Review (IMR) where considerable records are exchanged at an annoying frequency. Blockchain could also reduce, if not eliminate, the vexation of multiple requests for the same records.

The emphasis, however, is on "could". This is not a plug-and-play application that can transform the system through an adoption by a single claims administrator. We are talking about a transformative technology that could reduce costs and greatly improve efficiency if properly assessed, built, and maintained.

As noted by the Working Group:

> "In considering blockchain for adoption and use in State Government, as with any new technology, certain factors must be evaluated. Factors include procurement vehicles and overall cost; availability of training, knowledge and resources; compatibility with existing and future state architectures; ease of deployment and administration; security, data privacy and retention, and accessibility compliance; ability to meet established productive in-use requirements; as well as public and private support models and structures. These factors coupled with a well-defined business case outlining the need and potential advantages over existing solutions (more cost effective or efficient) will determine whether an application may be adopted in State Government." (p.56)

In the context of document management, whether within the QME process or in general within California's complex workers' compensation system, blockchain shows promise. The cautionary and encouraging work product of the Working Group underscores that all system stakeholders would need to embrace this technology and that the Division of Workers' Compensation (DWC) must be capable of sustainable management of it.

One need think, perhaps, of the Electronic Adjudication Management System (EAMS) and the recent unsuccessful effort to obtain budget authorization for its upgrade – the system is over 10 years old – as putting a DWC context to the observations made by the Working Group.

In the meantime, at the provider, practice management, and network management levels, there are technology solutions capable of addressing the immediate pressing concerns raised by stakeholders in comments to these fee schedule proposals. An open dialogue regarding blockchain use for these processes, and others, would be beneficial for all stakeholders. Technology is only as disruptive as those who use it perceive it to be. If the same energy were put into implementing solutions as is put into maintaining the status quo, beneficial change would be forthcoming.

Rating Bureau Filing Focuses on COVID-19 Data

The recent debate over the filing by the Workers' Compensation Insurance Rating Bureau's (WCIRB) recommended pure premium rate increase underscores the still confused relationship between insurance regulators, policyholders, producers and a competitive rate law adopted by the California Legislature over a quarter-century ago. In this particularly unique set of circumstances, it also should require a review of some of the decisions made earlier in the year regarding insurance premiums, most particularly about the use of COVID-19 loss data in the experience rating calculation.

Didn't the Legislature just pass Assembly Bill 685 (Reyes), creating an infrastructure in Cal/OSHA to investigate employers who are not doing all they should be doing to protect workers from COVID-19 infection and to take significant enforcement actions? And doesn't the presumption, for most employers, in Senate Bill 1159 (Hill and Daly) apply only when there is an "outbreak" at a specific place of employment?

That would seem to suggest the Legislature acknowledged not all employers are doing what they should do to limit their employees' risk of contracting COVID-19 at the workplace. And then there are the somewhat oblique references by employer advocates that, well, remember that COVID-19 data doesn't get included in the experience rating. For point of reference, Insurance Code § 11730(c) states:

> "'Experience rating' means a rating procedure utilizing past insurance experience of the individual policyholder to forecast future losses by measuring the policyholder's loss experience against the loss experience of policyholders in the same classification to produce a prospective premium *credit*, debit, or unity modification." (emphasis added)

Per its Special Regulatory Filing effective July 1, 2020, the WCIRB noted:

> "Claims arising directly from a diagnosis of COVID-19 with an accident date on or after December 1, 2019, would be excluded from the experience rating calculations of individual employers. Since the occurrence or non-occurrence of COVID-19 workers' compensation claims incurred by an employer is unlikely to be a strong predictor of that employer's future workers' compensation claim costs, the inclusion of such claims in an experience modification calculation would not meet the intended goal of experience rating."

In fact, no rating organization in the nation has included COVID-19 losses in the calculation of experience modifications. But that also begs a bit of a question. How is the insurance rate making process supposed to be sensitive to the variations in losses among similarly classified employers if not, at least initially, through the experience rating plan?

And thus, it appears, was at least in part the genesis of the COVID-19 group factor additive adjustments to the pure premium rates, these factors being based on the North American Industry Classification System (NAICS). To be clear, the grouping of classifications by NAICS sectors is not new. It has been used by the WCIRB in its calculation of expected loss ratios (ELRs) as part of the experience rating plan for at least the past five years. As noted by the WCIRB in its Regulatory Filing effective January 1, 2021:

> "The WCIRB's methodology to determine classification expected loss rates uses adjustment factors based on the experience of classifications grouped in accordance with the North American Industry Classification System (NAICS)."

What is unique in the pure premium filing is using this methodology for purposes of setting pure premium rates.

This effort has met with opposition, or at least angst, from many sectors in the community, including employer, labor, and insurer representatives. This suggests the repurposing isn't always appreciated by its intended beneficiaries.

For those who are concerned about the rate filing, the answer appears to be to leave it to individual insurers to price according to the risk presented by an individual employer as calculated through filed rating plans. These rate filings are themselves filtered through what is supposed to be a process where an insurer determines its risk appetite, assesses a wide range of data from the WCIRB and other sources, and files plans in order to compete in the marketplace. This latter factor is the ubiquitous "judgement" of carrier as codified in Insurance Code § 11730(k).

As stated by the State Compensation Insurance Fund (SCIF):

> "Carriers can address the potential COVID-19 exposure on employers through such pricing tools as Schedule Rating. Pricing tools allow carriers to more accurately determine the premium to be charged employers based upon their individual exposures. This approach is fair and appropriate and contrasts sharply with the imprecise use of the WCIRB proposed COVID-19 surcharge on all employers."

The real issue, as it relates to a 2020 rate filing to be effective January 1, 2021, is that there is simply too much variability in the data to be sanguine about pure premium rates being adopted based in part on estimated 2021 COVID-19 experience. As noted by SCIF, part of this is due to the changing 2020 environment, beginning with the Governor's Executive Order N-62-20, extending to a period where the presumption in that Order was not in effect, and then having Senate Bill 1159 (Hill and Daly) get chaptered as emergency legislation extending the presumption, with significant changes, back to July 6, 2020 – the day after the Governor's Order expired.

And there is more. There is this largely ignored question about the consequence of requiring workers' compensation claimants to exhaust supplemental paid sick leave (SPSL) requirements before collecting temporary disability or salary continuation benefits. It is not at all clear whether this data is being collected. It could affect temporary disability (TD) severity in claims that result in lost time. But it is even more complicated than that. Per Executive Order N-51-20 SPSL benefits were extended to food service workers not already receiving SPSL benefits mandated by the federal Families First Coronavirus Response Act (FFCRA). In other words, the Order extended SPSL benefits to employers with more than 500 employees in the food service sector.

Local jurisdictions also adopted ordinances at various times during this year to extend SPSL benefits to employees of employers not subject to the FFCRA requirements. Ultimately, Assembly Bill 1867 (Budget Committee), effective September 9, 2020, extended SPSL benefits as defined to most employers. Virtually all of these requirement will expire on December 31, 2020 unless Congress extends the FFCRA program.

For purposes of this rating filing, there is a difference between reporting TD payments on lost time claims and reporting TD payments on lost time claims affected by the SPSL exhaustion requirements. In other words, TD severity could increase in 2021 even if frequency does not, simply because of the impact of no longer requiring SPSL exhaustion to receive TD. Whether that will happen, and whether the SPSL program actually lowered claim frequency – as theorized by the New York Compensation Insurance Rating Board (NYCIRB) – should be the subject of significant review.

More to the point for a 2020 rate filing is that such questions must simply wait for the data to be acquired and analyzed.

The WCIRB presentation can be accessed here:

https://www.wcirb.com/sites/default/files/documents/2021101_cdi_public_hearing_wcirb_exec_summary-handout.pdf

New Privacy Regulations Proposed by Department of Justice

Per the California Department of Justice (DOJ), on October 12, 2020, the DOJ released a third set of proposed modifications to the regulations regarding the California Consumer Privacy Act (CCPA) that went into effect on August 14, 2020. The proposed regulations address withdrawn language from the previous rule-making text.

The proposed rules may be accessed here.